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3 400 R STREET
4 SACRAMENTO, CALIFORNIA
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9 REPORTER'S TRANSCRIPT
10 APRIL 24, 2018
11 CORPORATE FRANCHISE AND PERSONAL INCOME TAX HEARING
12 APPEAL OF
13 SHARON MITCHELL
14 18011715
15 AGAINST PROPOSED ASSESSMENT OF
16 ADDITIONAL INCOME TAX
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27 Reported by: Kathleen Skidgel
28 CSR No. 9039

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P R E S E N T

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Administrative Law Judge

Panel Members: Alberto Rosas
Administrative Law Judge

Michael Geary
Administrative Law Judge

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400 R STREET, HEARING ROOM
SACRAMENTO, CALIFORNIA
APRIL 24, 2018

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JUDGE STANLEY: Okay. Calling the appeal of Sharon Mitchell, case number 18011715. The date is April 24th, 2018. It is 9:10 a.m. And the location where this hearing is occurring is Sacramento, California.

The panel judges are myself, Teresa Stanley, Judge Alberto Rosas and Judge Michael Geary.

And I'm going to ask you to restate your names for the record, please.

MS. WEED: Christina Weed, counsel for Sharon Mitchell, the appellant.

MS. MENDES: Lisa Mendes, counsel for Sharon Mitchell, the appellant.

MS. MITCHELL: Sharon Mitchell.

MR. GEMMINGEN: David Gemmingen, counsel for Franchise Tax Board.

MR. IMMORDINO: Ciro Immordino, Tax Counsel, Franchise Tax Board.

MR. CORNEZ: Michael Cornez, Tax Counsel for Franchise Tax Board.

JUDGE STANLEY: Okay. Thank you. Feel free to stop and ask questions along the way if there are any. If I happen to be looking down, you

1 can catch the eye of one of my panel members.

2 MS. WEED: I'm sorry. I do have one
3 question. Can you just sort of explain the
4 approximate, you know, how things will go, how
5 things will proceed during the hearing?

6 JUDGE STANLEY: Certainly.

7 MS. WEED: Format.

8 JUDGE STANLEY: Certainly.

9 We're -- given the sophistication of the
10 representation here, we're going to be following a
11 little bit more formal processes. So we will have
12 the appellant present the case first. And you'll
13 have the opportunity to call witnesses.

14 We'll start with opening statements if you
15 choose to do those. You don't have to do an opening
16 statement. But we'll allow for cross-examination of
17 any witnesses who testify. And the judges may have
18 additional follow-up questions.

19 When appellant has completed presenting her
20 case, then we will turn to the Franchise Tax Board.
21 They haven't indicated that they have any witnesses
22 to call, so that side ought to go quickly. And then
23 we'll end with closing arguments if you choose to
24 give those.

25 Then just as part of the process after
26 that, once we close the record and take it under
27 submission, we, as a panel, will deliberate and
28 reach a decision and try to get that decision out

1 within a hundred days.

2 MS. WEED: Okay, thank you.

3 MR. GEMMINGEN: I'd just like to mention
4 that the Franchise Tax Board does have an opening
5 statement.

6 JUDGE STANLEY: Okay. Well, first, I need
7 to go through the preliminary stuff. I know --
8 thank you for your cooperation with both sides in
9 trying to get some of these exhibits admitted
10 without objection.

11 I'm just going to go down the list. And I
12 note that 1 through 25 was agreed admitted, to start
13 with. Is there any objection at this time to 1
14 through 25?

15 MR. CORNEZ: No, Your Honor.

16 JUDGE STANLEY: Ms. Weed, those are yours,
17 so I don't suppose you object?

18 MS. WEED: No.

19 JUDGE STANLEY: Okay.

20 Number 26 was the appraisal; and that one
21 the Franchise Tax Board had objected to relevance.
22 And is that still a standing objection?

23 MR. CORNEZ: Yes, it is.

24 JUDGE STANLEY: Okay. Ms. Weed, do you
25 want to respond to that?

26 MS. WEED: Yes. I believe in one of
27 respondent's briefs -- I believe it's their reply
28 brief -- they indicate that with respect to the

1 basis issue we haven't provided any substantiation.
2 So the appellant has actually paid for retroactive
3 appraisal going back to 1991, at the time she
4 inherited the property. So, you know, they've
5 called into question the fact that we haven't
6 substantiated the basis, so I would say it's
7 entirely relevant.

8 JUDGE STANLEY: Mr. Gemmingen?

9 MR. CORNEZ: Can I address that?

10 JUDGE STANLEY: Yeah.

11 MR. CORNEZ: So, as Exhibit 4 in the record
12 shows, the Plaintiff inherited a partnership
13 interest from her aunt. She has always asserted
14 that she's a partner in the partnership, and that is
15 in fact the reason why that this particular
16 transaction is before this body because she had to
17 have her partnership interest redeemed in order to
18 engage in the transaction that she claims she did.
19 And so she did not inherent a direct interest in the
20 underlying real property; rather, she inherited an
21 interest, a partnership interest.

22 The law requires that the taxpayer, under
23 the Duty of Consistency Doctrine, start with the
24 inherited basis of the partnership interest, which
25 was shown on the partnership return -- or, I'm
26 sorry, which was shown on the estate tax return that
27 her aunt filed. Because of the size of her aunt's
28 estate a -- an estate tax liability was owed,

1 therefore, the value that the estate put on the
2 partnership interest had a tax significance. And
3 for the taxpayer to now, some 25 years later, claim
4 a different starting tax basis, violates the duty of
5 consistency.

6 JUDGE STANLEY: Okay. Can I just say that
7 I think that goes to the merits of the argument and
8 not to the relevance of the document itself. If
9 they believe that they can -- if they want to try to
10 present the fact that they had a different basis
11 than is reflected on the probate statement or the
12 initial 706 tax return, then I think that there's
13 potentially relevance in the document that shows
14 what the basis is.

15 MR. CORNEZ: Well, that --

16 MR. GEMMINGEN: I'm sorry.

17 MR. CORNEZ: But she didn't inherit an
18 interest in real estate, and the appraisal is an
19 interest in real estate. It's not an appraisal of a
20 partnership interest. Nor does the appraisal
21 reflect a condition of the property, whether or not
22 there were lease payments, whether or not there was
23 a mortgage. It's full of caveats and conditions and
24 speculation as to the value of the real estate. But
25 fundamentally, she didn't inherit an interest in a
26 real estate, she inherited a partnership interest.

27 JUDGE STANLEY: Okay. Like I said, I think
28 those arguments go to the merits of her claim, not

1 to the relevance of the document. It is the sort of
2 document on which reasonable people rely in
3 valuating property. And I know that you don't think
4 the property should be valued, but I think we're
5 going to admit Exhibit 26 and use it. And you can
6 argue, when you get the opportunity, you can argue
7 the validity of the using real property basis for
8 what you believe to be a partnership interest.

9 Twenty-seven, 27 and 28, I noted that there
10 were -- there was concern from the Franchise Tax
11 Board, mostly about privacy objection, which I think
12 we addressed by removing certain portions of that.
13 But somebody else had expressed a relevance
14 objection to the 2007 tax returns. Does that
15 objection still stand?

16 MR. CORNEZ: I don't believe so.

17 JUDGE STANLEY: Okay. And 27, 28 and 29, I
18 had the same objection. So are you objecting to
19 admitting those documents at this time?

20 MR. CORNEZ: No. I would note that they
21 did eliminate most of the partnership tax return on
22 number 28. All the K-1's for the other partners.
23 So it's a much shorter.

24 JUDGE STANLEY: Yes, yes. Okay.

25 On 30 to 32 there was no objection. That's
26 still true today?

27 MR. CORNEZ: Correct. Yes.

28 JUDGE STANLEY: Thirty-three is a Legal and

1 Vesting Report. There was a relevancy objection to
2 that one; does that still stand?

3 MR. CORNEZ: No, we're withdrawing our
4 objection. It appears it just reflects the
5 recordation of Deeds.

6 JUDGE STANLEY: Okay. And 34, I believe,
7 was also a relevance objection; does that still
8 apply?

9 MR. CORNEZ: Yes.

10 JUDGE STANLEY: Ms. Weed, do you want to
11 address Exhibit 34?

12 MS. WEED: Yes. If I can just review that
13 real quick for one minute.

14 So I believe that this letter is relevant
15 to the extent the appellant's intent with respect to
16 the 1031 exchange has been called into question, and
17 this letter seems to indicate that going back as far
18 as 1990 a like-kind exchange in connection with 130
19 Tampico Way, which is the property at issue, was
20 contemplated at that time.

21 JUDGE STANLEY: Mr. Gemmingen or --

22 MR. CORNEZ: I would say that this letter
23 is written to -- not to the taxpayer but to somebody
24 else and it reflects another party. I don't know
25 who PTLA is, but it doesn't seem to be the taxpayer.
26 And the letter's not written to the taxpayer, so I
27 don't know how that's relevant to the taxpayer.

28 JUDGE STANLEY: Okay. So I'm going to

1 admit that as a hearsay document that will be
2 subject to the -- to the rule in 11513 under the
3 APA, the Administrative Procedure Act. Which means
4 that it will only be considered if corroborated by
5 other evidence.

6 Number 35 through 38, there was no
7 objection; is that still true?

8 MR. CORNEZ: Correct.

9 JUDGE STANLEY: And number 39, there were
10 two objections. One has been sustained. So the
11 part of that document and any testimony that would
12 be presented would be precluded if it's a discussion
13 of the law or an application of the law to facts.

14 MS. WEED: Judge Stanley?

15 JUDGE STANLEY: Yes.

16 MS. WEED: Would that include the witness?
17 It's Jeff Krajewski's memorandum. He's also going
18 to testify, or I was planning to call him as a
19 witness. He is a CPA, but he has testified in court
20 as an expert and he's bound by the tax laws. And
21 when he testifies, he speaks as to what the tax law
22 is.

23 JUDGE STANLEY: So he can speak to the
24 transaction and its application, and he can talk --
25 he can talk about it with his expertise, but just
26 going through -- in that document it suggests that
27 he's just going to explain the law to us.

28 MS. WEED: Okay.

1 JUDGE STANLEY: And we've got about eight
2 or more attorneys here who, hopefully, have
3 researched the law surrounding this. And since
4 Mr. Krajewski is not an expert in the law, he
5 probably couldn't qualify to testify to that.

6 So, you know, you can -- when you've got
7 him on the stand, we can see if there are any
8 objections that arise.

9 MS. WEED: Okay. I understand. Thank
10 you.

11 JUDGE STANLEY: Okay. And then there was
12 an objection to the percipient witness. Are you
13 still objecting to that given that Mr. Krajewski is
14 going to testify today?

15 MR. CORNEZ: I guess we would reserve our
16 right to see what his actual testimony is and
17 determine if he's a percipient witness of the
18 underlying the transaction, if he has any facts.
19 And until he testifies, we don't know.

20 JUDGE STANLEY: That's my feeling as well.
21 And I think that with respect to that document,
22 since it's just a summary of his testimony, I think
23 I'll reserve on whether to admit the document itself
24 or just accept his testimony as the evidence that we
25 use, that we have in the record.

26 Number 40 through 45, there was no
27 objection.

28 MR. CORNEZ: Correct.

1 JUDGE STANLEY: And the Declaration of
2 Mr. Milner, which is marked as Exhibit 46 in the
3 binder that we have today, is there any further
4 objection to admission of that?

5 MR. CORNEZ: Is he here to testify today?

6 MS. WEED: He is not.

7 JUDGE STANLEY: He --

8 MS. WEED: He is not.

9 JUDGE STANLEY: He is not.

10 MR. CORNEZ: So presumably it's treated
11 under 11514 as hearsay, subject to all the normal
12 rules?

13 JUDGE STANLEY: Correct. We'll admit it
14 subject to 11513 and 11514 of the Administrative
15 Procedure Act.

16 MR. CORNEZ: I do have one question with
17 respect to that. And we got -- two different times
18 throughout this process we got an e-mail of the
19 Declaration, which did not change, but there were
20 different exhibits attached each time. So I don't
21 know if that was on purpose or accidental.

22 And so which exhibits -- it may not really
23 matter, but which exhibits are attached -- I assume
24 the exhibits attached to the Declaration that's in
25 the record today are the only exhibits that are
26 relevant; I just want to clarify that.

27 JUDGE STANLEY: Ms. Weed, it looks like you
28 have the non-binding Letter of Intent, a letter from

1 Mr. Goodman.

2 MS. WEED: Yeah. The way that it's in the
3 binder is the correct version, and at the last
4 prehearing conference I actually had e-mailed the
5 corrected version at that time.

6 MR. CORNEZ: All right. Thank you.

7 JUDGE STANLEY: Okay. So the Exhibit 47 is
8 admitted with exhibits that are attached today.

9 JUDGE GEARY: 46.

10 JUDGE STANLEY: I'm sorry, 46.

11 Okay. So that takes care of -- okay. I
12 will just go back and do a little cleanup here
13 because I noted that there were no objections to
14 certain exhibits but did not state that they were
15 being admitted. So that would be documents 27 to
16 33, 35 to 38, and 40 to 45. They will all be
17 admitted without objection.

18 Okay. Moving on to respondent's exhibits.

19 We have A through S now. And I believe the
20 only one that had an objection at the time of the
21 prehearing conference was Exhibit N, which is a --
22 just what the FTB referenced as a courtesy copy of a
23 case, the *Perkins* case. Is there still an objection
24 to that, Ms. Weed?

25 MS. WEED: I had objected to that case and
26 the *Salvatore* case just because I didn't believe it
27 was evidence and should be admitted as an exhibit,
28 but --

1 JUDGE STANLEY: Do you have a response to
2 that?

3 MR. GEMMINGEN: Well, they're both clearly
4 on point and they go to the determination of the law
5 as well as how facts that are entered and the
6 taxpayer's failure to negotiate should not be
7 considered the true seller of the property.

8 JUDGE STANLEY: While I think it is not
9 essential for us to have copies of case law because
10 we have researched these cases and many more, I
11 don't see any harm to admitting them. They were
12 referenced as courtesy copies, and I'll note that
13 *Salvatore* was an exhibit presented by appellant as
14 well. So I'll just go ahead and admit those for
15 what it's worth.

16 MS. WEED: Okay.

17 JUDGE STANLEY: Are there any other
18 objections on A through S?

19 MS. WEED: What is S?

20 JUDGE STANLEY: S is the copy that we got
21 this morning, the partners' shared income, 2007 K-1.

22 MS. WEED: Oh, okay.

23 MR. GEMMINGEN: They're from their exhibit,
24 the partnership return they submitted.

25 JUDGE STANLEY: Except that we excluded
26 these. So this is something that we excluded from
27 appellant's exhibit and now you're proposing to put
28 it back in.

1 MR. GEMMINGEN: Yes. These go to relevance
2 as to the treatment of appellant by the partnership.
3 And they're the most contemporaneous documents that
4 go to establish them.

5 JUDGE STANLEY: So this is 2007, this Con
6 Med partnership return K-1's, right?

7 MR. GEMMINGEN: And then a California
8 Schedule D-1 by the partnership for the sale.

9 JUDGE STANLEY: Okay. Okay, wait.

10 So what I have is eight pages of K-1's and
11 then I have seller's final statement of two pages.
12 And then I have 2007 Schedule D-1. That would also
13 be for the Con Med partnership return?

14 MR. GEMMINGEN: I'm sorry. The First
15 American Title are -- actually -- I beg your
16 pardon -- are not from the return. But there are
17 other exhibits that do talk about it.

18 JUDGE STANLEY: Okay.

19 MR. GEMMINGEN: But they go to the
20 treatment of the taxpayer as a partner.

21 JUDGE STANLEY: Okay. So these -- those
22 two pages were already admitted. The first eight
23 pages were not, right?

24 MR. GEMMINGEN: I'm not sure about that.

25 JUDGE STANLEY: Okay.

26 MS. WEED: Judge Stanley, we would object
27 to the admission. We had agreed to withdraw them
28 because we didn't believe they're relevant.

1 I'm not aware that the other partners are
2 being audited. And the letter we had to Caroline
3 Mitchell, who was one of the partners in connection
4 with 130 Tampico, respondent has said is not
5 relevant. And so the scope of this is only with
6 respect to Sharon Mitchell in 2007.

7 JUDGE STANLEY: And Franchise Tax Board,
8 you believe it has relevance?

9 MR. GEMMINGEN: It has great relevance to
10 the treatment of the partnership and its
11 consideration of her and her partner. It identifies
12 her as a 10-percent partner at the end of the year.
13 It shows that she received the same distribution
14 amounts when coupled with the First American Title
15 documents. And she had no appreciable change or
16 economic interest in the transactions.

17 And the parties -- she, as listed as a
18 10-percent partner, gets the equivalent amount as
19 the other 10-percent partners, double the amount of
20 the 5-percent partners. And the parties have
21 been -- other parties' last names have been removed,
22 but it just shows what a 10-percent partner gets or
23 a 5-percent partner gets, and what she's getting
24 there and her, also, treatment as a 10-percent
25 partner, as shown on line D in the upper left
26 quadrant of her K-1.

27 MS. WEED: I would note that appellant has
28 no control over the other K-1's of the other

1 partners. She has no control what they report on
2 their returns. They have nothing to do with her.

3 If they're incorrect, it would be up to
4 those individual partners to contact the
5 partnership. She has no control over them. They're
6 not relevant to her.

7 We're not the ones who limited the scope of
8 the audit, the respondent did, and it's just with
9 respect to Sharon Mitchell.

10 JUDGE STANLEY: Okay. And similarly to the
11 issue of the appraisal that we admitted, I think I'm
12 going to admit the first eight pages as Exhibit S,
13 as Respondent's Exhibit S. And to the extent that
14 the parties want to argue their relevance to this
15 case, they'll have an opportunity to do so.

16 MS. WEED: Also, Judge Stanley, I would
17 note the last page is a typed-up page that I've
18 never seen before.

19 JUDGE STANLEY: I'm -- I pulled out the
20 eight pages of the K-1's. I was going to deal with
21 the other ones next.

22 MS. WEED: Okay.

23 JUDGE STANLEY: Because there are three
24 other documents that were attached. So the first
25 eight pages, it's marked and admitted as Exhibit
26 S.

27 Then moving to the Seller's Final
28 Settlement Statement, that's a two-page document. I

1 believe that's already been admitted as part of
2 appellant's exhibits.

3 MS. WEED: Yes, that's correct.

4 JUDGE STANLEY: So is there any objection
5 to marking this two-page document as T?

6 MS. WEED: No.

7 JUDGE STANLEY: I think they wanted this
8 for easier reference.

9 MS. WEED: That's fine. No objection.

10 JUDGE STANLEY: So we'll mark the Seller's
11 Final Settlement Statement of two pages as Exhibit
12 T, and it will be admitted as Exhibit T.

13 And then next we have a two-page D-1. And
14 I think that was not excluded from the partnership
15 return, so I think that that is also appellant's
16 exhibit; is that correct?

17 MR. GEMMINGEN: Thank you, Your Honor.

18 MS. WEED: Yes, that's correct.

19 JUDGE STANLEY: Okay. So there's no
20 objection to marking the two-page 2007 D-1 as
21 Exhibit U and admitting that; no objection?

22 MR. GEMMINGEN: I beg your pardon?

23 JUDGE STANLEY: The two-page Exhibit D-1
24 will be marked as Exhibit U and admitted without
25 objection.

26 The one page, the last page in the handout,
27 there's an objection that this document was never
28 presented before and we have no origin.

1 MR. GEMMINGEN: Well, this document simply
2 reflects the first page of the K-1 packet. You'll
3 see at line 10 there's a figure under column D, like
4 David, of \$611,102.

5 JUDGE STANLEY: I don't want to go through
6 the whole thing, Mr. Gemmingen, because that would
7 be testimony. But --

8 MR. GEMMINGEN: I was just showing the
9 relevance for it.

10 JUDGE STANLEY: Well, the relevance is that
11 you -- it's an exhibit that ties back to other
12 exhibits, is that --

13 MR. GEMMINGEN: Yeah, it explains the
14 figures on these exhibits here.

15 JUDGE STANLEY: Do you intend to present
16 those features during your argument?

17 MR. GEMMINGEN: Yes, I do.

18 JUDGE STANLEY: Okay. So --

19 MS. WEED: Judge Stanley, this isn't
20 evidence. This is argument.

21 JUDGE STANLEY: Correct. I believe that to
22 be the case. I think that these facts should be
23 tied together when the Franchise Tax Board has its
24 opportunity to do its argument.

25 MR. GEMMINGEN: It was my plan to do
26 that.

27 JUDGE STANLEY: Okay. So I'm not going to
28 mark and admit this last, this final page of what

1 was handed to us today. So the document itself will
2 not be considered, but you can feel free to go
3 through the whole thing when it's your turn.

4 Are there any other issues with respect to
5 exhibits that either party has? Ms. Weed?

6 MS. WEED: Not at this time.

7 JUDGE STANLEY: Mr. Gemmingen, Mr. Cornez?

8 MR. GEMMINGEN: No, thank you.

9 JUDGE STANLEY: All righty. So the only
10 one that we still have to consider later on is
11 Mr. Krajewski's summary statement. And we'll take
12 that up later.

13 Restating the issues, the Franchise Tax
14 Board has two:

15 Did Con Med, the partnership, sell 100
16 percent of the Tampico Way property for tax
17 purposes;

18 Number two, was there an anticipatory
19 assignment of income from the partnership to the
20 taxpayer such that all income from the sale is
21 attributed in the partnership?

22 And Ms. Mitchell's issues are:

23 Did she meet the requirements of a
24 like-kind exchange of real property pursuant to
25 Internal Revenue Code section 1031;

26 And secondarily, what is the true basis of
27 her, either, partnership interest or property
28 interest, real property interest?

1 At this time, if there are no questions,
2 I'm going to ask if the appellant would like to make
3 an opening statement?

4 MS. WEED: Yes, I would.

5 JUDGE STANLEY: Proceed.

6 You can feel free to keep your seat if you
7 want to.

8 MS. WEED: Okay.

9 JUDGE STANLEY: Whatever's more comfortable
10 for you.

11 MS. WEED: Normally standing, but I don't
12 think this is tall enough.

13 Okay. So the issue before your Board at
14 this time is whether Sharon Mitchell completed a
15 like-kind exchange. She has appealed the FTB's
16 proposed denial of denying to treat her exchange as
17 a like-kind exchange. But that's really the only
18 issue. Any other issues that respondent has brought
19 up are facts. They're issues of fact, not actual
20 legal issues.

21 The appellant is responsible and has the
22 burden of proof for establishing the facts in this
23 case. And the facts show that a 1031 exchange was
24 completed.

25 As a second issue in this case is what was
26 Sharon Mitchell's cost basis in connection with 130
27 Tampico Way. We propose that she should've received
28 a step up in basis at the time she inherited her

1 interest in 1991.

2 Sharon Mitchell was a owner of 130 Tampico
3 Way at the time the exchange occurred. This a fact.
4 It's not an issue.

5 The closing statement that has been
6 admitted into evidence by both appellant and
7 respondent indicate that there were three sellers at
8 the time that 130 Tampico Way was relinquished. It
9 was Con Med, the partnership; it was Sharon
10 Mitchell, the appellant; and it was Caroline
11 Mitchell, the appellant's mother.

12 Appellant was listed on this closing
13 statement and put her neck out there that if
14 anything went wrong with the transaction, she would
15 have been liable; the buyer would have looked to
16 her. She absolutely owned 130 Tampico Way. Deeds
17 were recorded, transfer taxes were paid. The
18 partnership, by a majority vote, I believe unanimous
19 vote, indicated that she could redeem her
20 partnership interest.

21 So the fact is Sharon Mitchell was the
22 owner of 130 Tampico Way. The issue of who was the
23 seller is really just not an issue that applies.

24 Now, FTB has argued in some of its briefing
25 that Sharon Mitchell was not always actively
26 involved in every step of the Purchase Agreement and
27 negotiating it, but that doesn't mean that Sharon
28 Mitchell didn't own the property. If every time I

1 went and put an offer on a house, I mean, do I get
2 my keys right at that moment when my offer is
3 accepted? No, because that's not a sale. The sale
4 or the transaction, the closing -- the sale occurs
5 at closing, and the closing statement shows who the
6 owners of the property were.

7 Whoever negotiated the sale is irrelevant.
8 Other entities and individuals negotiate on behalf
9 of others all the time. And in this case there's a
10 \$6.4 million property, 130 Tampico Way, that, you
11 know, I believe most people would ask for assistance
12 in negotiating a sale of this magnitude. So the
13 fact that Sharon Mitchell wasn't involved in every
14 single step does not mean she's not the owner and
15 that Con Med is the only seller.

16 Sharon Mitchell is entitled to engage in a
17 like-kind exchange pursuant to 1031. 1031, as you
18 all know, provides that gain or loss shall be
19 recognized on the exchange of property held for
20 productive use in a trade or business or for
21 investment if such property is exchanged solely for
22 like-kind property. In this case no gain is
23 recognized until the taxpayer actually cashes in
24 their investment.

25 Here, Sharon Mitchell had 130 Tampico Way,
26 a commercial property, which she never intended to
27 hold for personal use because it was a commercial
28 property. She exchanged it for a property that was

1 like-kind. I don't believe this fact is in dispute.

2 This is not, you know, an attempt to avoid
3 or evade tax. This is just deferring the
4 recognition of gain as Sharon Mitchell is entitled
5 to do. In fact, 1031 is a code section that's
6 automatic. You don't have to elect into it. If you
7 qualify, you get the treatment because Congress, at
8 the time they enacted 1031, was more concerned on
9 the burden it would put on a real estate investor or
10 other investor to pay tax before they had cashed out
11 their investment. And in this case when 130 Tampico
12 Way was relinquished, Sharon Mitchell obtained a
13 like-kind property, which she still holds today.

14 I don't believe her intent could be
15 questioned. She has never sold outright one of her
16 investment properties. She completed three other
17 like-kind exchanges in 2007 alone. She completed
18 numerous other exchanges prior to 2007. Her intent
19 is not an issue.

20 Now the pink elephant in the room, I think,
21 is that respondent doesn't like the fact that this
22 was the only property in 2007 that was exchanged out
23 of California and into Arizona. That's the only
24 difference between the other ones. All of the other
25 like-kind exchanges were respected by IRS, the
26 exchanges were duly reported on Sharon Mitchell's
27 2007 income tax return. They were never questioned
28 by the IRS, and Sharon's testimony will corroborate

1 that. The exhibits in the file help to corroborate
2 that.

3 Sharon Mitchell is simply entitled to a
4 like-kind exchange. And, again, we're not talking
5 about the evasion of tax, it's just deferring the
6 recognition of gain. If respondent believes that
7 Sharon Mitchell is really just intending to evade
8 tax, which is their burden of proof, I would welcome
9 them to show me one bit of evidence that indicates
10 she had an intent to evade tax and not an intent to
11 do a like-kind exchange.

12 Now the argument about the fact that a 1031
13 exchange did not occur is a very weak argument. So
14 respondent, as an alternate argument, has stated,
15 sort of grasping at straws, that this is an
16 Assignment of Income Doctrine issue if in fact a
17 1031 exchange occurred. But, again, the Franchise
18 Tax Board or respondent misses the mark when it
19 comes to 1031 exchanges.

20 With respect to the Doctrine of the
21 Assignment of Income, the concern and the rationale
22 is that if taxpayers are allowed to assign income to
23 a third party, they will be able to avoid tax. But
24 as we already know, this is not an attempt to evade
25 tax. It is a deferral of recognition of gain.
26 That's it. It's permitted under 1031. California
27 tax law fully complies to the federal law with
28 respect to this section.

1 And then, just in closing, I would want to
2 state that our second issue that we've brought
3 before your Board is the step up in basis. We
4 believe that Sharon Mitchell's testimony will
5 corroborate the fact that a 754 election was made at
6 the time that she should have received her step up
7 in basis. We believe that some of the exhibits in
8 our folder will corroborate this.

9 And, you know, the respondent is
10 responsible for computing the correct amount of tax.
11 They have the duty only to collect the correct
12 amount of tax. And Sharon Mitchell is entitled to
13 have her basis properly computed and respected and
14 she's entitled to a like-kind exchange.

15 And so we would urge your Board to please
16 find that a 1031 exchange did occur based on the
17 evidence of this case and that Sharon Mitchell is
18 entitled to a step up in basis.

19 Thank you.

20 JUDGE STANLEY: Thank you.

21 Franchise Tax Board, you have somebody
22 who's making an opening? Mr. Gemmingen?

23 MR. GEMMINGEN: Good morning. I'm David
24 Gemmingen. And today I'm joined by Ciro Immordino
25 and Michael Cornez.

26 And to get started today, as the Board will
27 remember, the United States Supreme Court and the
28 Board of Equalization precedent have repeatedly

1 confirmed that a transaction be characterized
2 differently for tax purposes with respect to income
3 tax consequences than the manner might be documented
4 for civil law purposes.

5 It's a longstanding principle in taxation
6 that substance prevails over form and transactions
7 of no economic substance are disregarded for income
8 tax purposes. We come today to reaffirm and
9 establish some basic income tax principles to ensure
10 that income arising from the sale of real property
11 is properly attributed to the party that owned and
12 sold the property in question.

13 JUDGE STANLEY: Mr. Gemmingen, can you just
14 speak a little more slowly so that Ms. Skidgel
15 doesn't have to work so hard.

16 MR. GEMMINGEN: Okay.

17 We would like to also confirm that there
18 are legal issues of who, for tax purposes, was a
19 seller, as well as the legal doctrine of the
20 Assignment of Income applies in this case.

21 Moreover, respondent's assessment in this
22 appeal is correct and should be upheld since, for
23 tax purposes, the partnership is the only party that
24 is the true seller of the property and income from
25 the sale is taxable to its partners, including the
26 appellant, a 10-percent partner under partnership
27 allocation provisions.

28 Respondent disallowed appellant's attempt

1 to defer gain from a later transaction for purported
2 exchange since appellant was not the seller of the
3 property for tax purposes and she repeatedly
4 admitted that she played no role in the negotiation
5 of the sale of the property.

6 As her preparation has shown you and as
7 will be demonstrated today, only the partnership,
8 Con Med, owned the real property in question from
9 its initial acquisition in the 1960s, to the
10 partnership negotiation of its sale in December
11 2006, through the execution of the final terms of
12 sale in February 2007. And only Con Med, the
13 general partnership, was designated and acknowledged
14 by the partnership itself in correspondence sent in
15 March 2007 to its partners, as shown in Exhibit D in
16 respondent's exhibits, as the property seller and
17 owner during those negotiations.

18 Appellant repeatedly ignored supplemental
19 briefing requests from the Board of Equalization to
20 address her failure to participate in the sale of
21 property and references to section 1031 demonstrates
22 a continuing unwillingness to address the true issue
23 at hand; that is, that the partnership was the true
24 seller of the property.

25 California partnership law, in a single
26 sentence it can be clear, provides that Corporations
27 Code section 16501 that a partner is not co-owner of
28 partnership property and has no interest in

1 partnership property that can be transferred either
2 voluntarily or involuntarily.

3 In addition, as a general partner in the
4 partnership, as set forth in Corporations Code
5 section 16404, appellant owed the partnership the
6 duty of loyalty and duty of care. The fiduciary
7 duty of loyalty means that partners must place the
8 partnership's best interests above their own
9 personal interests. That is to say, when a
10 partnership contracts to sell its primary asset, a
11 partner cannot take any action to obstruct that sale
12 by the partnership. The duty of loyalty provides
13 that partners may not act to harm the partnership's
14 goal for their own gain.

15 Appellant's actions to discuss her
16 purported distribution are all subject to her duty
17 of loyalty and care to the partnership. In fact, as
18 shown by the many documents provided by appellant,
19 including Con-Med's, the partnership's, 2007 federal
20 and California tax returns, the partnership still
21 treated Appellant Sharon Mitchell, as a 10-percent
22 partner up to the end of the partnership's year and
23 to receive roughly the same \$662,000 amount that the
24 other 10-percent partners in Con Med received.

25 In this case Con Med Properties, a
26 California general partnership, acquired commercial
27 property on Tampico Way in Walnut Creek during the
28 1960s, and solely owned that property up until the

1 sale by the partnership. As demonstrated by several
2 of the sales documents provided by appellant, the
3 partnership on its own account and for its own
4 benefit commenced sale negotiations for 100 percent
5 of the Tampico property, received a written and
6 executed offer for the property in December 2006, as
7 provided in Respondent's Exhibit A, more than 11
8 months before the sale ultimately closed in November
9 of 2007.

10 As the partnership negotiated the sale of
11 the property for the next few months pursuant to
12 subsequent counter-offers, including in February
13 2007, as shown by Exhibits B, C and D, the
14 partnership was always the only party designated and
15 contemplated as the property seller. We'll
16 establish for two distinct reasons the Franchise Tax
17 Board's allocation of income to appellant which
18 arose from the partnership's sale of property and
19 resulting tax assessment are correct.

20 First, Franchise Tax Board will demonstrate
21 that for income tax purposes the partnership was the
22 only party that sold the property. We'll show that
23 appellant owned -- was a 10-percent partner in the
24 partnership and, as previously briefed, partnership
25 tax law, pursuant to section 702 of the Internal
26 Revenue Code, as incorporated to the California law,
27 works to allocate 10 percent of the partnership's
28 gain from the sale of property to appellant.

1 Second, the partnership on November 27th,
2 2007, just as the sale of the property was closing,
3 finally executed two Deeds related to the Tampico
4 Way property. These two Deeds are Appellant's
5 Exhibits 6 and 7. One Deed, signed on November
6 27th, reported for civil law purposes to transfer a
7 10-percent tenant-in-common interest in the property
8 to appellant. And on that same day, November 27th,
9 2007, the partnership also executed the Joint
10 Conveyance Deed to the two new buyers who acquired
11 100 percent of the property.

12 The transitory timing of these documents,
13 which were then recorded on November 29th and
14 November 30th, respectively, illustrated appellant's
15 actions as the representative previously
16 acknowledged, and in her representative's own words,
17 as provided in Respondent's Exhibit J, were designed
18 to allow appellant to ride on the coattails of the
19 partnership's sale of the property.

20 Appellant's actions with her 10-percent
21 Deed and the Assignment of Income Doctrine, which
22 has been described by the U.S. Supreme Court as the
23 first principle of taxation, this doctrine stands
24 for the proposition that one who earned the income
25 is taxed on it regardless of who receives the
26 proceeds.

27 We'll show that the partnership's
28 negotiation of the sale of the property coupled with

1 the appellant's repeated admissions that she did not
2 participate in the negotiations of the property's
3 sale during her time as a partner and the
4 partnership's ownership of the property during the
5 commencement to the conclusion of the negotiations
6 of the sale of the property illustrate that
7 appellant's and her accommodating partnership's
8 actions were attempts to improperly assign income.
9 The result, that the income should remain and be
10 attributed to the assignor, which in this case is
11 the partnership.

12 Finding in favor of the FTB that either the
13 partnership was the only seller of the property for
14 tax purposes or that appellant engaged in an
15 improper attempt to have the partnership's income
16 assigned to her, confirms respondent's assessment
17 and forecloses the need to address appellant's
18 claimed 1031 exchange since the result is that
19 appellant had nothing left to sell or exchange.
20 Since appellant is not the seller of the property,
21 she cannot properly claim gain deferral for section
22 1031.

23 Thank you. We'll present our arguments
24 after appellant's opening arguments.

25 JUDGE STANLEY: Thank you.

26 If you're ready to proceed, Ms. Weed, you
27 have the opportunity to call your first witness.

28 MS. WEED: Yes. I would first call Jeff

1 Krajewski.

2 JUDGE STANLEY: Okay.

3 Mr. Krajewski, there's a stand with a
4 microphone over there, which will be helpful for
5 you.

6 And if you will please state your name and
7 spell it for the reporter.

8 MR. KRAJEWSKI: Jeff Krajewski, spelled
9 K-r-a-j-e-w-s-k-i.

10 JUDGE STANLEY: And if you'll raise your
11 right hand, please. Do you solemnly swear or affirm
12 that you will tell the truth, the whole truth, and
13 nothing but the truth?

14 MR. KRAJEWSKI: Yes.

15 JUDGE STANLEY: Thank you. You can be
16 seated. And if that microphone is not on, there
17 should be a button.

18 MR. KRAJEWSKI: Testing.

19 DIRECT EXAMINATION

20 BY MS. WEED:

21 Q. Good morning, Mr. Krajewski.

22 A. Good morning.

23 Q. Could you please briefly describe your
24 educational history for the Court?

25 A. Yes. I've got a BS, Bachelor of Science,
26 in accounting, with a minor and a certification of
27 special studies in computer sciences.

28 Q. Okay. And what is your current

1 occupation?

2 A. I'm a Certified Public Accountant in the
3 State of Arizona.

4 Q. How long have you been licensed as a CPA?

5 A. Roughly 35 years.

6 Q. Have you always worked as a CPA since the
7 time you were licensed?

8 A. Well, there was a brief sabbatical, about
9 seven years.

10 Q. And what did you do during that time?

11 A. I was a principal and vice chairman of a
12 commercial real estate investment firm, situated in
13 Phoenix, Arizona.

14 Q. Have you written any note-worthy
15 publications?

16 A. No.

17 Q. Were you hired by Sharon Mitchell to
18 testify today?

19 A. Yes.

20 Q. Have you ever testified as an expert
21 before?

22 A. Yes, on several occasions.

23 Q. Do you know approximately how many times?

24 A. Oh, geez. Over 35 years, maybe half a
25 dozen or so.

26 Q. Do you know some of the courts that you've
27 testified as an expert in?

28 A. They were predominantly state court,

1 Arizona.

2 Q. Okay. Are you currently scheduled to
3 testify in any other courts?

4 A. Yes.

5 Q. Which one?

6 A. United States Tax Court.

7 Q. Okay. In what capacity?

8 A. Expert witness.

9 Q. And what is the scope of your testimony
10 that you will present in tax court?

11 A. Centers around code section 280(e) and some
12 methodology that was employed by the taxpayer with
13 respect to restrictions thereunder.

14 Q. Okay. And that's 280(e) of the Internal
15 Revenue Code?

16 A. That is correct.

17 Q. Do you anticipate that you will also cite
18 to case law in your testimony?

19 A. Yes.

20 Q. Is extensive knowledge of the Tax Code and
21 tax case law necessary for your anticipated
22 testimony in tax court?

23 A. Yes.

24 Q. Does your profession on a daily basis
25 require extensive knowledge of the Tax Code and tax
26 case law?

27 A. Yes.

28 MS. WEED: Can Mr. Krajewski please be

1 qualified as an expert witness?

2 JUDGE STANLEY: Is there any objection?

3 MR. CORNEZ: Yeah, I have an objection.
4 We've already gone over this and you've already
5 determined that he's not an expert and he's not
6 testifying as an expert witness. So I'm not sure if
7 we're renewing this argument.

8 JUDGE STANLEY: No, we didn't rule that he
9 was not an expert witness for purposes of testifying
10 to this transaction and similar 1031 transactions.
11 We excluded his testimony relative to explaining the
12 law to the panel.

13 MR. CORNEZ: Then I guess I would renew the
14 objection because, as you well stated, the experts
15 in this room are the three judges who are tax
16 lawyers deciding the tax case, and it doesn't seem
17 appropriate to have somebody explain the tax law to
18 a panel of judges whose job it is to determine what
19 the tax law is.

20 JUDGE STANLEY: Okay. And, Ms. Weed, do
21 you intend to have this expert testify as to this
22 transaction and other 1031 transactions that he's
23 been involved in or just to the law as it applies?

24 MS. WEED: I expect to ask him questions
25 about his experience in connection with 1031
26 exchanges and any documents he's reviewed in
27 preparation for today.

28 JUDGE STANLEY: That's valid testimony for

1 an expert witness. Do you have an objection to him
2 testifying as an expert?

3 MR. CORNEZ: Yes.

4 JUDGE STANLEY: You still have an
5 objection?

6 MR. CORNEZ: Same objection. There is an
7 expert in the courtroom. I hate to say it over and
8 over, but the panel are experts in the law.

9 If I might ask him a couple questions to
10 further -- as further basis for my objection; would
11 that be appropriate?

12 JUDGE STANLEY: Yes, except to the extent
13 that you're going to ask him about his knowledge of
14 the law, that just gets into --

15 MR. CORNEZ: No, I'm not.

16 JUDGE STANLEY: -- the same decision.

17 Okay. I'm going to let you proceed
18 briefly.

19 MR. CORNEZ: It is briefly.

20 JUDGE STANLEY: Okay.

21 VOIR DIRE EXAMINATION

22 BY MR. CORNEZ:

23 Q. Did you prepare the partnership's 2007 tax
24 return?

25 A. No.

26 Q. Did you prepare Ms. Mitchell's 2007 tax
27 return?

28 A. No.

1 Q. Were you involved in this transaction in
2 any basis, at the time back in 2007?

3 A. Thank you. No.

4 MR. CORNEZ: So he's not a percipient
5 witness to this particular transaction. He was not
6 involved in this particular transaction, and so we
7 would say that there's no basis for his testimony.

8 JUDGE STANLEY: Okay. And I'm going to go
9 ahead and qualify him as an expert with respect to
10 matters relevant to accounting for and qualified for
11 1031 exchanges based on his testimony that he's
12 participated in such activities for 35 years and has
13 the education and certification that I think
14 qualifies him as an expert.

15 So you may proceed.

16 MS. WEED: Thank you, Your Honor.

17 DIRECT EXAMINATION (cont'd)

18 BY MS. WEED:

19 Q. Mr. Krajewski, can you please describe the
20 types of tax services you provide at your current
21 firm or place of employment?

22 A. It's a general accounting firm. We're
23 involved in accounting, review services, tax
24 preparation, tax planning, taxpayer representation
25 with respect to all forms of ownership, whether
26 that's individual, partnership, corporate, sub S,
27 trusts, estates.

28 Q. Okay. Thank you.

1 Can you please describe the types of tax
2 services you have provided throughout your 35 years
3 of experience?

4 A. Well, that pretty much runs the gamut with
5 respect to what I earlier said. But, you know, just
6 to repeat myself, tax preparation, tax planning,
7 taxpayer representation.

8 Q. Okay, thank you.

9 Do you have experience with 1031 exchanges?

10 A. Yes.

11 Q. Please describe your experience with
12 respect to 1031 exchanges?

13 A. Well, I certainly get involved with those
14 through my practice in assisting clients in
15 structuring such transactions and accounting for and
16 reporting the tax ramifications associated with
17 those transactions. In addition, I've been
18 involved, as I mentioned earlier, as a principal and
19 vice chairman. On the commercial real estate
20 investment firm, we were engaged in several 1031
21 exchanges.

22 Q. Okay. Thank you.

23 Are you a member of any professional
24 organizations or groups that are relevant to the
25 subject of a 1031 exchange?

26 A. Aside from the American Institute of
27 Certified Public Accountants and the Arizona Society
28 of Certified Public Accountants, no.

1 Q. Okay, thank you.

2 What documents have you referred to in
3 preparation of your testimony today?

4 A. The correspondence relating to this
5 transaction, tax returns for both the taxpayer and
6 the Con Med partnership, and then various tax work
7 cases, code section 1031 and its related
8 regulations.

9 Q. Okay, thank you.

10 And what case law have you referred to in
11 preparation for your testimony today?

12 A. That would include *Magneson v.*
13 *Commissioner, Bolker v. Commissioner* and *Maloney v.*
14 *Commissioner.*

15 JUDGE STANLEY: Excuse me. What was the
16 third one?

17 MR. KRAJEWSKI: *Maloney.*

18 JUDGE STANLEY: Just to be clear, I know
19 Franchise Tax Board is concerned about testimony
20 regarding the law itself, but for now he's just
21 testifying as to his -- what he reviewed in
22 anticipation of this hearing.

23 Sorry.

24 MS. WEED: No, that's okay. Thank you.

25 BY MS. WEED:

26 Q. Have you referred to anything else?

27 A. I believe that's it.

28 Q. Okay. Have you ever completed a 1031

1 exchange yourself?

2 A. In my capacity as principal and vice
3 chairman of the real estate firm, yes.

4 Q. Okay. In the course of your practice as a
5 Certified Public Accountant, have you encountered
6 any federal tax law that requires you to hold real
7 property for a certain period of time before you
8 relinquish it in a 1031 exchange?

9 A. No.

10 Q. In the course of your practice as a
11 Certified Public Accountant have you encountered any
12 case law that requires you to hold real property for
13 a certain period of time before you relinquish
14 property in a 1031 exchange?

15 MR. CORNEZ: I'm going to object. Again,
16 we're crossing into what the law is here.

17 JUDGE STANLEY: Okay.

18 MS. WEED: I'm just asking if he's referred
19 to any case law that has indicated that.

20 JUDGE STANLEY: So, just to be clear,
21 because I know there's a standing objection as to
22 the discussion of the law. An expert witness cannot
23 testify on issues of law or application of law to
24 the facts. However, they can testify as to what
25 they relied on in reaching the conclusion that they
26 did with respect to this case.

27 He has personal knowledge in the field of
28 expertise that he's testifying about and he can

1 testify as to what he reviewed and he can testify as
2 to what his opinion on the ultimate facts in this
3 case are. The fact that he uses the law to support
4 that opinion is valid information and the panel will
5 accept it to the extent that it is relevant to us.
6 Okay.

7 I'll note the standing objection though.

8 BY MS. WEED:

9 Q. Mr. Krajewski, would you like me to repeat
10 the question?

11 A. Please.

12 Q. In the course of your practice as a
13 Certified Public Accountant, have you encountered
14 any case law that requires you to hold real property
15 for a certain period of time before you relinquish
16 that property in a 1031 exchange?

17 A. No.

18 Q. In your experience and practice, do you
19 advise clients that they are required by the federal
20 tax law to hold real property for a certain period
21 of time before they relinquish said property in a
22 1031 exchange?

23 A. No.

24 Q. In your experience are you aware of or did
25 you assist with any 1031 exchanges that were
26 disregarded because the property relinquished was
27 not held for a certain period of time before the
28 1031 exchange occurred?

1 A. No.

2 Q. In your opinion is a 1031 exchange designed
3 to evade tax?

4 A. No.

5 Q. What is the goal of a 1031 exchange?

6 A. Well, to maintain continuity of investment
7 and to defer the tax that would otherwise result
8 from recognition.

9 Q. Okay, thank you.

10 Are you aware of the Assignment of Income
11 Doctrine?

12 A. Yes.

13 Q. Have you advised clients on this topic?

14 A. Occasionally.

15 Q. Can you please describe what the Assignment
16 of Income Doctrine is?

17 A. Well, to preserve the integrity of the
18 progressive tax rate structure under the United
19 States Tax Code, in the sense of prohibiting the
20 splitting or assignment of income to achieve a
21 different result.

22 Q. Based on your understanding of the facts in
23 this case, is the Assignment of Income Doctrine
24 applicable?

25 A. I don't believe so.

26 Q. Why not?

27 A. Well, because the taxpayer was not
28 attempting to evade tax but simply defer the

1 recognition of the capital gain associated with the
2 transaction in accordance with 1031.

3 Q. In your practice, do you advise clients on
4 basis considerations related to real property?

5 A. Yes.

6 Q. In your practice, do you advise clients on
7 basis considerations related to inheritance?

8 A. Yes.

9 Q. It has been asserted by the FTB in this
10 case that Sharon Mitchell is not entitled to the
11 step up in basis she claimed in connection with her
12 inheritance in 1991 of a partnership interest that
13 held 130 Tampico Way; is this correct?

14 A. Would you repeat that for me, please?

15 Q. Yes. It has been asserted by the FTB in
16 this case that Sharon Mitchell is not entitled to
17 the step up in basis she claimed in connection with
18 her inheritance in 1991; is this correct?

19 MR. CORNEZ: We're going to object to that
20 question.

21 JUDGE STANLEY: On what basis?

22 MR. CORNEZ: He's -- there's no evidence to
23 support that we're making that assertion.

24 JUDGE STANLEY: That may require a
25 rewording of the question.

26 MS. WEED: I'll withdraw that question.

27 JUDGE STANLEY: It's a valid objection.

28 MR. GEMMINGEN: Also, can you please have

1 her clarify what basis amount she's referring to,
2 please?

3 MS. WEED: Question's withdrawn.

4 JUDGE STANLEY: Well, you'll have an
5 opportunity to cross-examine. So if you have that
6 question after she's finished, you can feel free to
7 ask it of him.

8 BY MS. WEED:

9 Q. Have you done any analysis of the basis in
10 this case prior to testifying today?

11 A. Yes.

12 MS. WEED: One second. I need to grab an
13 exhibit. Was there an exhibit folder for the
14 witness?

15 JUDGE STANLEY: I think we have an extra
16 copy up here.

17 MS. WEED: The respondent's exhibits. I'm
18 sorry.

19 JUDGE STANLEY: Oh, you want respondent's
20 exhibits.

21 JUDGE GEARY: You won't be using your
22 exhibits, counsel?

23 MS. WEED: Thank you. Here's an extra.

24 JUDGE STANLEY: Okay. Thank you.

25 BY MS. WEED:

26 Q. Mr. Krajewski, could you please refer to
27 Respondent's Exhibit G?

28 A. Okay.

1 Q. Do you recognize this document?

2 A. Yes.

3 Q. Can you briefly just describe what it is?

4 A. Let me revisit it for a moment if I
5 might.

6 Q. Okay.

7 MR. CORNEZ: Can I just clarify, also, that
8 this is your Exhibit 15?

9 MS. WEED: Yes.

10 MR. CORNEZ: Okay.

11 MR. KRAJEWSKI: Yeah, this memorandum had
12 to -- dealt with the determination of basis in
13 Sharon Mitchell's 10-percent interest in the Con Med
14 partnership.

15 BY MS. WEED:

16 Q. And at the time you prepared this memo --
17 what is the date of the document?

18 A. October 28th, 2015.

19 Q. At the date of this memo in October 2015,
20 were you aware at any time prior to preparing this
21 memo that a 754 election had been made on behalf of
22 Sharon Mitchell?

23 A. I was not.

24 Q. If a 754 election had been made, would that
25 have increased the basis, in your analysis?

26 A. Yes.

27 Q. Why is that?

28 A. Well, I say "yes" predicated on the

1 appraisal for the real estate. So to that extent
2 that the appraised value would justify a step up in
3 basis, the answer is yes.

4 Q. Would a retroactive appraisal be the best
5 way to determine the basis of the real property in
6 question at the time Sharon Mitchell inherited the
7 property, or the partnership interest?

8 A. Yes, absent anything more
9 contemporaneous.

10 Q. Okay. One minute.

11 Mr. Krajewski, in your experience assisting
12 with 1031 exchanges, have you encountered a
13 situation such as Sharon Mitchell's in which the
14 partnership interests were redeemed closer to the
15 closing of escrow?

16 A. Yes.

17 Q. Can you please describe that experience or
18 that situation?

19 A. Well, specifically a transaction I was
20 involved in as the principal of the commercial real
21 estate investment firm. We had a partnership that
22 owned a commercial asset, and at the time of
23 entering into the sales transaction there were a
24 contingent of those investors that wanted to perform
25 a 1031 exchange and then there was another
26 contingent within the partnership that wanted to
27 cash out. And so we effectuated a
28 drop-and-swap-type transaction.

1 Q. And how close in time, if you recall, was
2 the drop before the exchange?

3 A. I don't recall specifically, but within a
4 couple of months.

5 Q. Okay. And was that 1031 exchange ever
6 challenged by the IRS?

7 A. It was not.

8 Q. Was it ever challenged by the state in
9 which the exchange occurred?

10 A. It was not.

11 MS. WEED: We have no further questions at
12 this time.

13 JUDGE STANLEY: Okay.

14 MR. CORNEZ: Can we have two minutes to
15 prepare a more smooth questioning?

16 JUDGE STANLEY: Sure. We can take a break.
17 We'll take 10 minutes and hope to start promptly
18 after that.

19 MR. CORNEZ: All right. Thank you.

20 (Whereupon a break was taken from
21 10:15 a.m. until 10:30 a.m.)

22 JUDGE STANLEY: Okay. Let's reconvene
23 since it appears everybody's back. And we were at
24 the point where the Franchise Tax Board was given
25 the opportunity to cross-examine the witness.

26 MR. CORNEZ: Thank you. I'm going to stand
27 so I can see him better.

28 /////

1 CROSS-EXAMINATION

2 BY MR. CORNEZ:

3 Q. Could you turn to Exhibit 15, or what was
4 our -- I'm sorry.

5 What was our letter?

6 MS. WEED: G.

7 MR. CORNEZ: G, thank you.

8 MR. KRAJEWSKI: Okay.

9 BY MR. CORNEZ:

10 Q. So you write in Item 6(b) that to the best
11 of your knowledge and belief there was no 754
12 election by the partnership.

13 A. Yes.

14 Q. Has something occurred that changes that
15 conclusion?

16 A. Yes. At the time that this was drawn, I
17 was relying primarily on the partnership tax return.
18 I didn't see anything within it.

19 Subsequently, I was presented a 754
20 election, albeit unsigned, and without a valuation
21 schedule attached to it. But that's the extent of
22 it.

23 Q. Who presented that to you?

24 A. Sharon Mitchell.

25 Q. Did you give that to taxpayer's counsel,
26 Ms. Weed?

27 A. I believe she's --

28 MS. WEED: It's not the witness's document.

1 He didn't give me any document, no.

2 JUDGE STANLEY: Well, is that -- that
3 hasn't been included in any of the exhibits?

4 MS. WEED: That document was located after
5 the deadline for exchanging exhibits, but I do have
6 a copy with me.

7 JUDGE STANLEY: Okay. Would you like to
8 see a copy of that?

9 MR. CORNEZ: Well --

10 JUDGE STANLEY: It would be hard for you to
11 address it without seeing it. It's hard for this
12 panel to address, too.

13 BY MR. CORNEZ:

14 Q. But you don't know whether it was attached
15 to any tax return or not?

16 A. That is correct.

17 Q. You don't know whether it was signed by the
18 partnership or the managing partner or not?

19 A. That is correct.

20 Q. If, in fact, there was a valid 754 election
21 filed by the partnership, and in the case of an
22 inheritance of a partnership interest, I believe
23 your testimony is that the partnership gets to step
24 up its basis in the event that the inherited
25 partnership interest has a greater value than the
26 outside basis of that partnership interest at the
27 time of inheritance?

28 A. To the extent that the 10 percent -- in

1 this case the 10 percent market value of that real
2 estate exceeded what was being carried within the
3 partnership's books, yes.

4 Q. So your position is that the basis -- the
5 754 basis step up is the value of the underlying
6 real estate and not the value of ownership interest
7 that's inherited?

8 A. To the extent a 754 election is made,
9 yes.

10 Q. Isn't it true that health for investment or
11 continuity of interest, which is the doctrines that
12 you discuss in your testimony, are not the only
13 requirements for a valid section 1031 transaction?

14 A. That's correct.

15 MR. CORNEZ: We have no further
16 questions.

17 JUDGE STANLEY: Do you have any follow-up
18 questions, Ms. Weed?

19 MS. WEED: One moment, please.

20 No further questions.

21 JUDGE STANLEY: Okay. Judge Rosas, do you
22 have some questions for the witness?

23 JUDGE ROSAS: Thank you, Judge Stanley. I
24 do have a few questions.

25 Good morning, sir. How are you today?

26 MR. KRAJEWSKI: I'm fine, thank you.

27 JUDGE ROSAS: I'm going to apologize in
28 advance, but I may butcher your last name. Will you

1 please repeat it?

2 MR. KRAJEWSKI: Of course. Krajewski.

3 JUDGE ROSAS: Krajewski.

4 MR. KRAJEWSKI: Or Klieski (phonetic) if
5 you prefer.

6 JUDGE ROSAS: I'll go with the first one,
7 thank you.

8 Mr. Krajewski, earlier during your
9 testimony you mentioned that you have been
10 representing clients as a CPA for over a period of
11 35 years; is that correct?

12 MR. KRAJEWSKI: Correct.

13 JUDGE ROSAS: And in that time you also
14 mentioned that you have assisted clients in
15 structuring 1031 exchanges. Approximately how many
16 1031 exchange transactions have you assisted?

17 MR. KRAJEWSKI: I'd be estimating, but
18 probably a dozen and a half, two dozen, over that
19 tenure.

20 JUDGE ROSAS: And in addition to assisting
21 clients in structuring 1031 exchange transactions,
22 have you also represented clients whose 1031
23 transactions were questioned or challenged by a
24 taxing agency?

25 MR. KRAJEWSKI: I've had none questioned.

26 JUDGE ROSAS: So just to be clear, you have
27 not represented clients at any audits by any taxing
28 agency regarding 1031 exchange transaction?

1 MR. KRAJEWSKI: No. My answer was that
2 they weren't challenged. I had one that was the
3 subject of an audit, but it was accepted as
4 presented.

5 JUDGE ROSAS: Sir, do you have the copy of
6 the exhibit binders there in front of you?

7 MR. KRAJEWSKI: Yes.

8 JUDGE ROSAS: I'm going to refer you to
9 Appellant's Exhibit 36.

10 MR. KRAJEWSKI: I believe I have only A
11 through R here.

12 JUDGE STANLEY: You need the big one.

13 MR. KRAJEWSKI: That number again, please?

14 JUDGE ROSAS: Thirty-six.

15 MR. KRAJEWSKI: Okay.

16 JUDGE ROSAS: Specifically, I'm going to
17 refer your attention to the second page, second to
18 the last paragraph.

19 And specifically my question to you is,
20 what is the significance of that plan that seemed to
21 have been contemplated regarding providing for a
22 dissolution of the partnership prior to close of
23 escrow, followed with providing for distribution to
24 each partner of an undivided interest in the
25 property?

26 MS. WEED: Excuse me, I -- Mr. Krajewski
27 didn't write this and has no knowledge of this
28 document, so I'm not sure how he's supposed to

1 answer that question.

2 JUDGE ROSAS: I understand, counsel. Thank
3 you very much, but I'm just trying to get the
4 witness's expert opinion in terms of whether that
5 provision in that letter holds any correlation in
6 general for 1031 transactions or whether it's
7 limited to the specifics of this transaction.

8 MR. KRAJEWSKI: Well, in reading this, it
9 would seem to suggest, or at least hint to the fact
10 that a dissolution of the partnership was being
11 considered -- and I could only speculate because it
12 doesn't come out and say this -- but for purposes of
13 allowing each of the partners to proceed according
14 to their investment objective, whether that was to
15 conduct a 1031 exchange or whether it was to cash
16 out.

17 MS. WEED: Your Honor, I would still object
18 to this on the basis that Mr. Krajewski didn't draft
19 this. He has no knowledge of it. And the letter's
20 from Tom Milner who is not a lawyer or a CPA or tax
21 or financial expert. So I would object to him
22 answering that question.

23 JUDGE STANLEY: Okay. And I would be
24 inclined to overrule that objection because of the
25 fact that an expert witness, once qualified, can
26 testify to hypotheticals. And I believe that Judge
27 Rosas is using this letter for the purpose of
28 presenting a hypothetical to get his expert opinion

1 on how that would have been treated or effected.

2 So I think it's an appropriate question,
3 and I don't know if Judge Rosas has gotten his
4 answer that he was looking for.

5 JUDGE ROSAS: I have further questions,
6 Your Honor. Thank you.

7 Sir, I'm trying to get a sense of whether
8 one of the factors that you have seen in the
9 successful drop-and-swap transactions that you have
10 been involved in, I'm trying to get a sense of
11 whether in those successful transactions if you have
12 seen, if you have seen a partnership dissolution
13 take place prior to the sale or whether that's any
14 relevance in general?

15 MR. KRAJEWSKI: I have not seen a complete
16 dissolution of a partnership.

17 JUDGE ROSAS: You say you have not seen a
18 complete dissolution of a partnership. Can you
19 elaborate on what you have seen?

20 MR. KRAJEWSKI: I have seen where
21 partnership interests were dropped, essentially
22 redeemed with the partnership and then held in
23 tenants in common.

24 JUDGE ROSAS: And in reviewing this
25 paragraph once again, it seems like there was a plan
26 of action to assign the undivided interests to all
27 the partners. When you mentioned that you've seen
28 transactions where there is a partial dissolution,

1 in your experience is 100 percent of the interest
2 assigned to the underlying partners as tenants in
3 common?

4 MR. KRAJEWSKI: No, just those interests
5 that are being dropped from the partnership.

6 JUDGE ROSAS: You mentioned that you have
7 been involved in about -- if I recall from your
8 testimony -- approximately a dozen and a half to two
9 dozen 1031 exchange transactions; is that correct?

10 MR. KRAJEWSKI: Yes.

11 JUDGE ROSAS: And in those transactions in
12 which you have been involved, sir, would you say
13 that there is a common set of characteristics that
14 are exhibited by these transactions?

15 MR. KRAJEWSKI: Can you be more clear?

16 JUDGE ROSAS: I'll try.

17 The dozen and a half to twenty-four 1031
18 transactions that you've been involved in, do they
19 all share a common set of characteristics that, in
20 your opinion, made them more likely to avoid audit
21 by one of the taxing agencies?

22 MR. KRAJEWSKI: Well, most of them didn't
23 involve a drop-and-swap-type strategy. They were
24 straight-up exchanges.

25 JUDGE STANLEY: Most of them did not, did
26 you say?

27 MR. KRAJEWSKI: Did not involve, yes.

28 JUDGE ROSAS: Aside from not involving a

1 drop-and-swap, what other common characteristics did
2 you see in those transactions?

3 MR. KRAJEWSKI: Well, in those that I've
4 been involved with, generally they're -- we're
5 looking at a deferral of gain. The transactions
6 involve identifying replacement property within the
7 required 45-day timeframe and completing the
8 acquisition of that replacement property within the
9 sooner of 180 days or the due date of that year's
10 return, including valid extension.

11 Those are common denominators, if you
12 will.

13 JUDGE ROSAS: Speaking of common
14 denominators, earlier you discussed briefly the
15 issue of the holding requirement. Was the holding
16 requirement an issue in any of these
17 dozen-and-a-half to twenty-four dozen transactions
18 that you were involved with?

19 MR. KRAJEWSKI: An issue insofar as it
20 being challenged by anybody?

21 JUDGE ROSAS: Either/or, whether it was
22 challenged or not.

23 MR. KRAJEWSKI: No.

24 JUDGE ROSAS: Follow-up to that question,
25 was there a holding period in those transactions
26 that you were involved in?

27 MR. KRAJEWSKI: A holding period
28 consideration? Yes.

1 JUDGE ROSAS: And can you elaborate, if you
2 recall?

3 MR. KRAJEWSKI: Yes. That pertained to a
4 transaction that I was involved in, again as a
5 principal of the real estate investment firm I made
6 reference to earlier. And what we were considering,
7 what I was considering, is whether or not the
8 dropping of the interest for those partners that
9 were desiring to cash out within roughly a couple of
10 months of the expected closing date would be a
11 defensible holding period.

12 JUDGE ROSAS: And in terms of the
13 defensible holding period, can you provide an
14 average estimate of the length of the duration of
15 the holding period for those transactions that you
16 were involved in?

17 MR. KRAJEWSKI: Well, the ultimate outcome,
18 I think -- well, looked more toward identifying
19 intent as opposed to trying to identify a specific
20 period of time. And in all that I researched in the
21 course of putting together that transaction, all the
22 case law that I reviewed seemed to suggest that what
23 was paramount in defending the holding period wasn't
24 so much the amount of time as it was the intent of
25 the individual or, let me say, taxpayer that was
26 performing, attempting to perform that exchange.

27 JUDGE ROSAS: You mentioned that the
28 importance of the amount of time wasn't as relevant

1 as the intent. However, in regards to the amount of
2 time, can you provide an estimate of what the amount
3 of time was for those transactions?

4 MR. KRAJEWSKI: For this particular
5 transaction I'm referring to, it was a couple of
6 months.

7 JUDGE ROSAS: And based on your overall
8 experience in dealing with 1031 transactions,
9 specifically in drop-and-swap transactions, in your
10 expert opinion, sir, how does Ms. Mitchell's
11 transaction compare to those other transactions that
12 you've been involved in?

13 MR. KRAJEWSKI: I think it's comparable
14 insofar as the -- what she was intending to do.
15 And, if I may elaborate, in her instant case, she
16 held an interest in the Tampico property for more
17 than 16 years; and in all likelihood would have
18 continued to do so if not for the tenant's decision
19 not to further extend that lease.

20 In her particular case, she had
21 demonstrated that her investment objective wasn't
22 one for investing for gain, rather for cash flow
23 which required -- her objective was to be able to
24 continue the investment that she enjoyed with
25 Tampico for those 16 years and had communicated with
26 the partnership and through various correspondence
27 with the buyer of that property, the property that
28 she was looking to relinquish, that it was her

1 intention to want to perform a -- or conduct a 1031
2 exchange. And, in fact, ultimately she did.

3 And, as Ms. Weed had indicated in her
4 opening remarks, Ms. Mitchell continues to hold that
5 investment she exchanged into more than 10 years
6 ago. Which I think when you look at this
7 transaction holistically, it's quite clear that she
8 successfully achieved continuity of investment, and
9 for all intents and purposes has maintained that
10 investment for greater than 26 years, collectively.

11 So I think in her particular case, her
12 actions have been consistent with the benefits that
13 are available under code section 1031, and I believe
14 what Congress had intended.

15 JUDGE ROSAS: I believe you mentioned
16 looking at this transaction holistically. If we are
17 to look at it holistically, and keeping in mind
18 Appellant Ms. Mitchell's intent, as you described
19 it, to perform a 1031 exchange, had she approached
20 you, let's say in 2005, and expressed an intent to
21 do a 1031 exchange because the partnership was going
22 to sell the property, had she approached you in
23 2005, communicated that intent, pursuant to your
24 advice would you have advised her to do anything
25 differently than what had transpired here?

26 MR. KRAJEWSKI: Yes.

27 JUDGE ROSAS: What would you have advised
28 her to do differently?

1 MR. KRAJEWSKI: Well, in all likelihood
2 would have attempted to drop her interest perhaps
3 sooner than what actually took place.

4 I think in terms of the Purchase and Sale
5 Agreement, depending on, you know, if I advised her
6 in a -- prior to a perspective buyer being
7 identified, would have made her a party to the
8 contract at the onset, or subsequently by way of
9 Addendum to the Purchase and Sale Agreement.

10 However, in the course of reviewing this
11 particular case, I did run across a document with
12 respect to the assignment of interest where the
13 partnership was effectively redeeming her 10-percent
14 interest that was essentially acknowledged and
15 signed off by the buyer of the property. So it was
16 clear, at least through that action, that the buyer
17 was aware that Sharon Mitchell was, in fact, a
18 tenant-in-common interest pursuant to this sale.

19 JUDGE ROSAS: In addition to attempting to
20 drop the interest sooner and being a party to the
21 contract, would there have been any other things
22 that, in your opinion, should have been done
23 differently?

24 MR. KRAJEWSKI: Well, depending on the
25 expanse of time from the point in which the interest
26 was dropped and the closing date, a separate
27 accounting with respect to the income and expense
28 associated with the underlying property as to which

1 related to the Con Med partnership and what portion
2 related to Ms. Mitchell's tenant-in-common interest.

3 In addition to that, we oftentimes see a
4 Tenant-in-Common Agreement, whether between the
5 multiple tenant and tenants in common or the tenants
6 in common and the partnership.

7 JUDGE ROSAS: Anything else, sir?

8 MR. KRAJEWSKI: I believe that covers it.

9 JUDGE ROSAS: And before I conclude, you
10 mentioned something earlier in regards to, I believe
11 you were addressing the Redemption Agreement. I
12 believe you stated that the buyer signed off, so
13 they were aware of Ms. Mitchell's ownership
14 interest.

15 As a follow-up to that, do you know when
16 the buyers became aware of Ms. Mitchell's ownership
17 interest?

18 MR. KRAJEWSKI: Well, as I recall -- well,
19 I can't say specifically. But at the very latest,
20 the date of that Redemption Agreement, I believe,
21 was November 17th, 2007. So it had been, in all
22 likelihood, no later than that.

23 JUDGE ROSAS: Well, thank you,
24 Mr. Krajewski. I have no more questions at this
25 time.

26 JUDGE STANLEY: Judge Geary?

27 JUDGE GEARY: Yes, thank you. Let me turn
28 this on.

1 Mr. Krajewski, do you have a file that
2 pertains to your work on this case?

3 MR. KRAJEWSKI: I do.

4 JUDGE GEARY: Does it contain every
5 document that you reviewed in preparation for your
6 testimony?

7 MR. KRAJEWSKI: Not with me, no.

8 JUDGE GEARY: You said that you reviewed
9 various correspondence. Can you, from memory or by
10 reference to the file, or both, tell us what
11 documents you actually reviewed, other than the
12 cases that you referred to, to prepare for your
13 testimony?

14 MR. KRAJEWSKI: I'd have to go through them
15 one-by-one and let you know that.

16 JUDGE GEARY: Is your file right there?

17 MR. KRAJEWSKI: Is my file or the exhibit
18 file?

19 JUDGE GEARY: No, your file.

20 MR. KRAJEWSKI: It's in my briefcase.

21 JUDGE GEARY: Would it contain most of the
22 documents you reviewed?

23 MR. KRAJEWSKI: No.

24 JUDGE GEARY: Would you take a minute and
25 get your file for me, please?

26 MR. KRAJEWSKI: Sure.

27 Okay.

28 JUDGE GEARY: Can you go through your file

1 and just pull out or identify for me correspondence,
2 other than correspondence that you've exchanged with
3 counsel for Ms. Mitchell, that you reviewed and
4 relied upon, in part, in giving your testimony here
5 today?

6 MR. KRAJEWSKI: Sure, if you give me just a
7 moment.

8 JUDGE GEARY: Sure.

9 MR. KRAJEWSKI: I'm looking at a
10 Counter-offer to Counter-offer that appears to be
11 dated February 26, 2007.

12 I'm looking at yet another Counter-offer to
13 Counter-offer, dated February 6th, 2007.

14 I'm looking at an Agreement of Purchase and
15 Sale, dated December 14th, 2006 between Con Med
16 Properties, as seller, and PTLA Corporation, as
17 purchaser.

18 I'm looking at an Agreement of Redemption
19 of Partnership Interests that is dated November
20 17th, 2007.

21 I'm looking at exchange documentation with
22 First American Exchange Company concerning
23 Ms. Mitchell's exchange of Tampico Way and its
24 replacement properties. And this includes the
25 Exchange Agreement with First American Exchange and
26 its related exhibits.

27 I'm looking at the Declaration of Thomas
28 Milner, which appears to be dated, by him, as of

1 March 21st. I'm not sure if that says 2018 or 2010
2 to be honest with you.

3 And that Declaration includes a series of
4 unlabeled exhibits.

5 JUDGE GEARY: Are there five such exhibits?

6 MR. KRAJEWSKI: My copy shows five, yes, A
7 through E.

8 JUDGE GEARY: Okay.

9 MR. KRAJEWSKI: I'm also looking at a
10 correspondence from PTLA to Caroline Mitchell, dated
11 August 29th, 1990.

12 I'm looking at a correspondence from the
13 partnership Con Med Properties to all partners,
14 dated August 20th, 1990.

15 I'm looking at an e-mail that appears to be
16 from Thomas Milner to the Con Med partners, dated
17 December 13th, 2003.

18 Another e-mail from Thomas Milner to what
19 appear to be the partners of Con Med, dated January
20 12th, 2007 -- excuse me, January 5th, 2007.

21 I'm looking at another Memorandum from
22 Thomas Milner to the Con Med partners, dated March
23 2nd, 2007.

24 I'm also looking at the Seller's Final
25 Settlement Statement from First American Title
26 Insurance Company, dated November 30th, 2007.

27 I am looking at an Election to Adjust Basis
28 of Partnership Property Under Subsection 754, which

1 is unsigned and undated.

2 And then I've got -- and then I've got a
3 copy of the federal form 8824 with respect to the
4 2017 -- or, excuse me, 2007 tax return filed by
5 Sharon Mitchell.

6 And that's all that I have with me today.

7 JUDGE GEARY: Do you recall what other
8 documents you reviewed in preparation for your
9 testimony that you don't have with you today?

10 MR. KRAJEWSKI: You know, not -- not
11 without going through the full file back at the
12 office.

13 JUDGE GEARY: In addition to the documents
14 that you've reviewed in preparation for your
15 testimony, have you obtained information orally from
16 any source that you've relied upon?

17 MR. KRAJEWSKI: Other than my conversations
18 with Ms. Mitchell.

19 JUDGE GEARY: Not other than. So that
20 would be one source of information.

21 MR. KRAJEWSKI: Yes.

22 JUDGE GEARY: Any others?

23 MR. KRAJEWSKI: That would be the extent of
24 it -- well, other than her counsel.

25 JUDGE GEARY: Has Ms. Mitchell told you
26 anything factually that you've relied upon here
27 today that is not also apparent from the documents
28 you reviewed?

1 MR. KRAJEWSKI: I don't believe so.

2 JUDGE GEARY: Of the eighteen to
3 twenty-four 1031 exchanges that you have been
4 involved with, how many of those were
5 drop-and-swaps?

6 MR. KRAJEWSKI: I believe there were just
7 two.

8 JUDGE GEARY: You indicated in response to
9 a question from Judge Rosas that one of the things
10 you might have advised Ms. Mitchell had you been
11 involved early on in the planning process for this
12 exchange or attempted exchange is that you might
13 have told her to drop sooner. Why?

14 MR. KRAJEWSKI: Well, I think with respect
15 to the case law that I had reviewed, although
16 there's nothing under code section 1031 or its
17 regulations that make reference to a period of time,
18 there is the suggestion within case law that the
19 holding period is something that could be considered
20 as an indicator of intent of the taxpayer. But
21 nothing suggests a firm amount of time.

22 So the general thought is if you can
23 position yourself in such a way that more time
24 passes between the time of drop to the time of
25 closing, that it would be a stronger indication of
26 intent with respect to the exchange, and for the
27 continuity to substantiate the fact that an asset
28 was being held for investment purposes and not for

1 sale.

2 JUDGE GEARY: And would that have been the
3 reason, also, that you might have advised her to
4 make sure she was included as a party to the
5 original Contract of Sale if that could have been
6 done?

7 MR. KRAJEWSKI: Yes. I mean it would have
8 been -- quite honestly, I'm not sure we would be
9 sitting here today if she was specifically named as
10 a party to the Purchase and Sale Agreement at the
11 onset.

12 JUDGE GEARY: And same for the advice that
13 you might have given regarding separate accountings
14 of the various partnership or for other interests in
15 the property for longer period of time before escrow
16 closed on the sale?

17 MR. KRAJEWSKI: Well, with respect to that,
18 Your Honor, it's just for purposes of consistency,
19 no matter what that period of time is. But from the
20 moment that an interest is dropped to the point that
21 it is exchanged to have a separation of accounting
22 with respect to that tenant-in-common interest.

23 JUDGE GEARY: Thank you. Those are all the
24 questions that I have right now.

25 JUDGE STANLEY: Okay. My judge panel asked
26 a lot of the questions that I had, but I do have a
27 couple before we turn it back to Ms. Weed.

28 Mr. Krajewski, when you discussed what

1 advice you would have given her under a hypothetical
2 situation where she had come to you earlier, you
3 noted that the Redemption Agreement that is in
4 Appellant's Exhibit 19 and Respondent's Exhibit I is
5 dated November 17th of 2007. That was shortly
6 before the transaction, the sales transaction,
7 right?

8 MR. KRAJEWSKI: Can you give me the letter
9 exhibit once again, please?

10 JUDGE STANLEY: It's either "I" in the
11 small binder or 19 in the large binder.

12 MR. KRAJEWSKI: Okay. The Exhibit I
13 doesn't appear to have any of the signature pages.

14 What was the numbered exhibit again? I'm
15 sorry.

16 JUDGE STANLEY: 19.

17 MR. KRAJEWSKI: 19.

18 JUDGE STANLEY: You referenced the date of
19 that, so I was just clarifying that the document
20 that you reviewed shows the date of November 17th,
21 2007.

22 MR. KRAJEWSKI: Yes, it does.

23 JUDGE STANLEY: And that was shortly before
24 the sales transaction was completed?

25 MR. KRAJEWSKI: Yes.

26 JUDGE STANLEY: So did you, in any of the
27 documents that you reviewed or in any statements
28 that you were given as the basis for this, did you

1 have or come across anything that related to
2 negotiations before that Redemption Agreement was
3 made and signed, presumably by the partnership?

4 MR. KRAJEWSKI: I did view correspondence
5 as it related to negotiations, yes.

6 JUDGE STANLEY: Did you find any reason to
7 reach an opinion that it was in any sense beyond
8 Ms. Mitchell's control that that Redemption
9 Agreement was signed so late in the process?

10 MR. KRAJEWSKI: Well, the -- I don't know
11 that I would say it was beyond her control. She --
12 her mother, Caroline Mitchell, who was a partner and
13 subsequent tenant-in-common, was a member of the
14 board of Con Med. And I think that Sharon was
15 relying comfortably on her mother's influence with
16 respect to the transaction and assuring that
17 everybody's interests were properly aligned in the
18 transaction.

19 When I say "everybody's interests,"
20 Sharon's interests as a tenant-in-common. Although
21 at the time during the negotiation process, Sharon
22 didn't hold a tenant-in-common interest, it was
23 clear from the correspondence that I did view that
24 the anticipation and expectation was that a -- it
25 was both Sharon and Caroline's intention to want to
26 consummate and exchange for their interest in the
27 real estate.

28 JUDGE STANLEY: So you said that you would

1 have made her a party to the contract and advise her
2 to have an addendum, making her a party to the
3 contract. But none of the documents that you
4 reviewed evidenced that there was any attempt to do
5 that?

6 MR. KRAJEWSKI: I didn't see any of that.

7 JUDGE STANLEY: Okay. Did any of the
8 documents that you reviewed show that Sharon
9 Mitchell exercised any dominion and control over the
10 property, other than that she signed off on the sale
11 and had a Grant Deed assigned to her?

12 MR. KRAJEWSKI: None that I recall.

13 JUDGE STANLEY: Okay. And you said that
14 the exhibit that you have isn't signed. Did you see
15 a signed Redemption Agreement?

16 MR. KRAJEWSKI: I believe that was the
17 lettered exhibit. It appears that the numbered
18 exhibit is.

19 JUDGE STANLEY: Okay, I see that.

20 With respect to this Sale Agreement,
21 there's another copy of that that I see that's
22 unsigned. Did you review one of those that has a
23 signature on it? It's unclear from Exhibit A.

24 MR. KRAJEWSKI: Exhibit A?

25 JUDGE STANLEY: Exhibit A is signed by
26 PTLA.

27 Do you have one that shows who signed it on
28 behalf of Con Med?

1 MR. KRAJEWSKI: The signature line under
2 Exhibit A for Con Med is blank.

3 JUDGE STANLEY: Can you look in your
4 exhibits, Ms. Weed?

5 MS. WEED: Which exhibit is that?

6 JUDGE STANLEY: I'm looking for the
7 Purchase Agreement, the Sales Agreement. It's
8 Exhibit A in respondent's exhibits; and when I look
9 at that, I don't see a signature for Con Med.

10 MS. WEED: I don't believe I have that in
11 my exhibits.

12 JUDGE STANLEY: Okay. I'm just going to --
13 unless other questions have come up for any of the
14 judges --

15 JUDGE GEARY: I do have one question by way
16 of clarification. My notes may not be accurate, but
17 did you say you saw a copy of the Redemption
18 Agreement that the buyer that ultimately bought the
19 property signed off on?

20 MR. KRAJEWSKI: Acknowledged it, yes.

21 JUDGE GEARY: Is it one of the signatures
22 that's on the exhibit, the numbered exhibit, that --
23 19?

24 MR. KRAJEWSKI: Let's see. No. The
25 document I'm looking at, or the Exhibit 19 that I'm
26 looking at appears to have signature pages for the
27 respective partners of Con Med, but doesn't appear
28 to include the acknowledgement and signature that

1 was that of the buyer.

2 JUDGE GEARY: Do you have that document in
3 your file?

4 MR. KRAJEWSKI: I don't believe I have that
5 with me, but it is in my files.

6 MR. CORNEZ: Judge Geary, I believe it's
7 Exhibit 18, page -- I think it's the second to the
8 last page of Exhibit 18.

9 MR. KRAJEWSKI: Yes, that is the document
10 to which I'm referring.

11 JUDGE GEARY: Okay. So you were referring,
12 in your testimony originally, to the Assignment
13 Agreement that is acknowledged by a representative
14 of PTLA.

15 MR. KRAJEWSKI: That's correct.

16 JUDGE GEARY: All right, thank you. That's
17 my only clarification. Thank you.

18 JUDGE STANLEY: Ms. Weed, do you have
19 follow-up questions for the witness?

20 MS. WEED: Yes, I do.

21 REDIRECT EXAMINATION

22 BY MS. WEED:

23 Q. Okay. Mr. Krajewski, when I was asking you
24 questions earlier I believe you testified that you
25 had not encountered any federal tax law or case law
26 that requires you to hold real property for a
27 certain period of time before you relinquish it in a
28 1031 exchange; is that correct?

1 A. That is correct.

2 Q. So with respect to the holding period, you
3 have also indicated that if you had perhaps met with
4 Sharon Mitchell earlier than 2007 you may have
5 advised her, you know, a variety of things, one of
6 them being that the interest needed to be dropped,
7 you know, as soon as possible; is that correct?

8 A. Well, I don't know that I would use the
9 term "needed." And my response to your question
10 earlier, which was "no," is that there's nothing
11 under law that requires us to do so, just as a point
12 of clarification.

13 Q. Okay, thank you.

14 So I'm just curious, you know, what are you
15 basing your advice to clients on? Is there some
16 amorphous policy with the IRS or state taxing agency
17 that's being implemented and for fear that this rule
18 of thumb about a holding period will be arbitrarily
19 applied you're advising clients in this way? I
20 just, I'm trying to figure out the basis for this.

21 A. Well, it -- and I can't cite the material
22 or the guidance offhand. But in the course of my
23 readings and the research over the years, both in
24 advising clients as well as structuring transactions
25 in the real estate business in which I was a
26 participant, it seemed to suggest that the passage
27 of time would assist in supporting the taxpayer's
28 intent.

1 But again, under 1031 and its regulations,
2 there is nothing that specifically refers to the
3 element of time other than the prerequisite
4 conditions that a property, replacement property be
5 identified within 45 days and the acquisition of
6 that identified replacement property occur no later
7 than 180 days, or the due date of the return for the
8 year of exchange, including valid extension. Those
9 are the only references to time under the law that
10 I'm aware of.

11 Q. Okay, thank you.

12 And you also mentioned that you had
13 assisted with an exchange in which there was a
14 holding period before the exchange of, perhaps, two
15 months or less; is that correct?

16 A. Yes.

17 Q. And so why does that occur? I mean, in
18 reality in, you know, in practicality is it always
19 possible to know when the appropriate time is to
20 drop out your interest from a partnership?

21 A. Well, I don't believe so. I mean it's
22 facts-and-circumstance-based and every situation is
23 different. So I can't say that there's a rule of
24 thumb in that regard.

25 Q. Then why is it not always practical to drop
26 the partnership out sooner?

27 A. Well, in some respects, I mean when you --
28 the dropping of that interest is typically done when

1 the consortium of investors associated with that
2 partnership have differing objectives. And the idea
3 here is that in Sharon Mitchell's instant case, if
4 all of the partners of Con Med had desired to want
5 to effect an exchange, then there would have been no
6 need for Sharon to have her interest dropped.

7 As it was, most all of the other partners,
8 with the exception of Caroline Mitchell, desired to
9 cash out their investments. Sharon did not.

10 Q. Going back to the hypothetical that if
11 Sharon Mitchell came to you prior to 2007, would her
12 intent with respect to completing the exchange have
13 been questioned by you?

14 A. Not the intent.

15 Q. And in your opinion when we are talking
16 about intent, are we talking only about the
17 relinquished property?

18 A. You're looking at the transaction as a
19 whole. So in my opinion, it includes not only the
20 relinquished property but the replacement property
21 as well.

22 Q. Okay. You stated, I believe, that the only
23 evidence of Sharon Mitchell exercising dominion and
24 control over the property was the Grant Deed that
25 was recorded; is that correct?

26 A. I don't think I said "Grant Deed," but yes.

27 Q. Okay. I believe you also referred to the
28 Seller's Closing Statement in your file?

1 A. Yes.

2 Q. In your opinion does the existence of that
3 document and the fact that Sharon Mitchell is listed
4 as one of the owners indicate she had dominion and
5 control over the property?

6 A. It does.

7 Q. In your opinion at what point during the
8 transaction does the sale occur?

9 A. At the point of closing.

10 MS. WEED: Okay. I believe that's all the
11 questions I have at this time.

12 MR. CORNEZ: I have a couple, please.

13 RECROSS-EXAMINATION

14 BY MR. CORNEZ:

15 Q. I think you said that you saw
16 correspondence between Mrs. -- Ms. Mitchell and the
17 buyer. Did I hear you correctly? Did I
18 misunderstand what you said?

19 A. I think that may have been Caroline
20 Mitchell, not Sharon Mitchell.

21 Q. All right. And other than the
22 acknowledgement of receipt that we spoke about,
23 which is at the end of Exhibit 18, did you see any
24 other documentation to indicate that the buyer knew
25 of Sharon Mitchell's ownership of the underlying
26 real property?

27 A. Certainly the closing documents.

28 MR. CORNEZ: Okay.

1 JUDGE STANLEY: Okay. I'm sorry to do
2 another round, but I'm going to ask you if you have
3 any follow-up questions?

4 JUDGE ROSAS: I do not, but thank you,
5 Judge Stanley.

6 JUDGE STANLEY: Judge Geary?

7 JUDGE GEARY: I do not.

8 JUDGE STANLEY: I did have one that came
9 up.

10 So I believe you said that you did include,
11 when you were going over the list of documents that
12 you have with you today, you did include the e-mail
13 from January 5th, 2007 that is in Exhibit 44?

14 MR. KRAJEWSKI: I'm --

15 JUDGE STANLEY: Can you just verify that?

16 MR. KRAJEWSKI: I'm going to trust you
17 saying so. Otherwise I have to go through this
18 again because I didn't make note of it.

19 JUDGE STANLEY: Well, you can look at
20 Exhibit 44 and tell me if that was one of the
21 documents you reviewed.

22 MR. KRAJEWSKI: Okay.

23 Yes.

24 JUDGE STANLEY: Okay. And with respect to
25 having advised -- your hypothetical that you would
26 have advised her to have been involved in the sales
27 process sooner, would it change your advice if you
28 saw under bullet item number one that there was some

1 concern by other partners that an earlier drop would
2 potentially foul the deal?

3 MR. KRAJEWSKI: Well, my opinion, my
4 professional opinion, having been involved with all
5 this -- when I say involved with all this, actually
6 as an investor in real estate -- is simply trying to
7 more efficiently manage the sale process rather than
8 attempting to manage that process by committee.

9 You know, if you can limit the points of
10 friction to the least number, then you're going to
11 proceed with the transaction more efficiently. And
12 in this particular case, from everything I saw,
13 Sharon Mitchell's objectives in terms of the
14 disposition of the Tampico property were aligned
15 with the objectives of the Con Med partners, with
16 the exception of the desire of wanting to conduct an
17 exchange.

18 So in terms of those things most commonly
19 negotiated in the sale process, not the least of
20 which is the disposition price, but the due
21 diligence and everything like that, as long as
22 Sharon's objectives were in proper alignment with
23 the partnership's, there would be less, if any, need
24 for her to be directly involved with that.

25 Now, talking hypothetically, if Sharon's
26 interests, the taxpayer's interests, at any point in
27 time became different or divergent with the partners
28 of Con Med, then I would expect that she would have

1 taken further courses of action. But that need --
2 did not appear to arise in everything that I
3 reviewed.

4 JUDGE STANLEY: Okay. And Judge Rosas
5 asked you earlier about the dissolution of the
6 partnership being originally anticipated to occur
7 prior to this sale.

8 In the second paragraph of that same bullet
9 item on Exhibit 44, if they utilized the solution
10 expressed in that section, would that have mirrored
11 your advice to her at the time that you would have
12 thought they did the dissolution contingent upon the
13 close of escrow, that it would still effect a valid
14 transfer in 1031?

15 MR. KRAJEWSKI: I don't know that I would
16 have followed that advice necessarily. The idea
17 of -- I mean if the partnership were to completely
18 dissolve, if that's what they're suggesting there,
19 and that all partners then would hold a
20 tenants-in-common interest, I'd have to think about
21 that. I'm not sure that that would have satisfied
22 me at the time.

23 JUDGE STANLEY: Okay. Do you have any
24 follow-up questions now, Ms. Weed?

25 MS. WEED: Not at this time. Thank you.

26 JUDGE STANLEY: Franchise Tax Board?

27 MR. CORNEZ: No questions. Just a further
28 point.

1 JUDGE STANLEY: Further point for closing
2 argument?

3 MR. CORNEZ: Well no, it's not for closing
4 argument. If he's finished testifying.

5 JUDGE STANLEY: Okay. So you don't have a
6 question for this witness. Are you going to address
7 exhibits again?

8 MR. CORNEZ: No. I want to address this
9 witness. So you have -- it appears that you're
10 deeming him to be an expert witness. And,
11 therefore, as this panel knows, there's no
12 attorney-client privilege between the attorney that
13 retains an expert and the expert.

14 And so we would ask that he provide us a
15 complete copy of his file, including all
16 correspondence between him and Ms. Weed in the event
17 that an issue needs to be addressed and that we
18 might need to do supplemental briefing to address
19 it.

20 JUDGE STANLEY: Do you have a response to
21 that?

22 MS. WEED: Just object on the grounds of
23 relevance to all of the communications and all of
24 the documents. I'm not sure what the scope of this
25 is.

26 JUDGE STANLEY: Unless the judges on my
27 panel have a different opinion on this, I believe
28 this is an attempt at late discovery and we're so

1 far into the process that I don't think it would be
2 helpful to completion of this process to require
3 him -- to keep our record open for further briefing
4 and require him to give you a complete list of all
5 the documents that he's reviewed and show you copies
6 of them. I believe that that's just further
7 discovery and I think that ship has sailed.

8 MR. CORNEZ: He referenced a document today
9 that nobody has seen or heard of or been referenced
10 prior to today, which is this unsigned 754 election.
11 So I don't think that that's true, that the ship has
12 sailed because we did not know that he was going to
13 be designated as an expert witness until today.

14 MS. WEED: Well, that document is not
15 admitted because we missed the deadline on that. If
16 you would like a copy of that specific document, I
17 have a copy. But it's not an admitted exhibit.

18 JUDGE STANLEY: I believe that since he's
19 testified specifically to that document that it
20 would be helpful to have that in the record. So if
21 you do have a copy, I can ask Ms. Holmes to make
22 additional copies for the Franchise Tax Board and
23 the judges.

24 So we will mark that as Appellant's Exhibit
25 47 and give a chance to the parties to review it
26 before I ask you if you have any objection to it.

27 So, we may want to take another short
28 recess.

1 MS. WEED: Yeah, I only have one copy.

2 JUDGE STANLEY: You have one?

3 MS. WEED: May I approach?

4 JUDGE STANLEY: Ms. Holmes can get that
5 from you and make copies for everyone.

6 We'll just go off the record and recess for
7 a few minutes.

8 (Whereupon a break was taken from
9 11:35 a.m. until 11:40 a.m.)

10 JUDGE STANLEY: First of all, do you have
11 any objection to admitting that into evidence?

12 MR. CORNEZ: I'm sorry?

13 JUDGE STANLEY: Do you have any objection
14 to admitting that into evidence?

15 MR. CORNEZ: Well, yes, lots of objections.
16 It's not signed. It's not dated. We don't know
17 which tax return it was attached to, if it ever was.
18 We don't know where it came from. We don't know who
19 provided it. We don't know who typed it.

20 But other than that --

21 And the key fact would be that if in fact
22 there were a 754 election, it would have had to have
23 been on the 1990 tax return. I believe it was 1990
24 when she inherited her interest. So if it showed up
25 in any year after that, it wouldn't matter anyway.
26 There's just a bare typed piece of paper.

27 So for those reasons, we would object.

28 JUDGE STANLEY: Okay. Ms. Weed?

1 MS. WEED: Just to clarify, I believe it
2 was the 1991 return. And, I mean, we didn't admit
3 this. We didn't think we made the deadline. It's
4 not signed. We can have Sharon testify about it and
5 what she recalls, but we have not tried to admit
6 it.

7 JUDGE STANLEY: Okay. And rather than
8 admitting it at this point then, let's reserve that
9 for Ms. Mitchell's testimony and see if we can lay
10 any more foundation for it. It can always be
11 entered as a hearsay document without any supporting
12 admissible evidence, though it would have no real
13 use.

14 But let's just set that aside and keep it
15 marked as Exhibit 47 for now, and we'll address that
16 later.

17 But I wanted to return to Exhibit 39 and
18 ask if it is your intent to either withdraw that
19 exhibit or lay a foundation for admitting the first
20 page-and-a-half into evidence?

21 MS. WEED: Can we ask Mr. Krajewski some
22 questions about it in order to hopefully lay some
23 foundation?

24 JUDGE STANLEY: That would be acceptable.
25 Go ahead.

26 FURTHER REDIRECT EXAMINATION

27 BY MS. WEED:

28 Q. Mr. Krajewski, can you please turn to

1 Exhibit 39?

2 A. Okay, I'm there. I'm there.

3 Q. Did you -- do you recognize this
4 document?

5 A. Yes.

6 Q. Did you prepare it?

7 A. Yes.

8 Q. When did you prepare it?

9 A. I completed it on March 29th, two
10 thousand -- uh, let's see.

11 Q. I believe --

12 A. Huh. Let's see. That actually is
13 misdated. That would have been -- I believe that
14 should have been 2018.

15 Q. Okay. So that looks like it might be a
16 typo?

17 A. Yeah.

18 Q. It should be 2018?

19 A. Yeah.

20 Q. Okay.

21 A. Just by way of explanation there, I think I
22 was in the heat of tax season, working on 2017
23 returns and that's all that was on my head.
24 Sorry.

25 Q. Are the contents of this Memorandum based
26 upon the documents you reviewed in this case?

27 A. Yes.

28 MS. WEED: We would move to admit this

1 document.

2 JUDGE STANLEY: Franchise Tax Board?

3 MR. CORNEZ: Well, are we admitting the
4 whole thing?

5 JUDGE STANLEY: We're talking about page 1
6 and half of page 2.

7 Well, wait. Wait, wait, wait.

8 So the only part that we've excluded
9 appears to be the discussion of the cases, which
10 would be half of page 2 and all of page 3. The rest
11 seems to be documentation in a memo by Mr. Krajewski
12 based on what he reviewed.

13 MR. GEMMINGEN: I'm sorry, could you please
14 restate?

15 JUDGE STANLEY: I'm sorry. I was looking
16 down at the exhibit while I talked.

17 So the only part that we've excluded
18 expressly so far is the second half of page 2 and
19 all of page 3.

20 MR. GEMMINGEN: Well, one item is -- on the
21 items prior to December 2006, there's a relevance
22 issue because the Purchase and Sale Agreement
23 referenced at the bottom of page 1 specifically
24 states that supersedes all prior agreements. And so
25 the items that are referred to above relate to
26 conversations that the operative agreement here,
27 Purchase and Sale Agreement as amended, specifically
28 overrides.

1 JUDGE STANLEY: So are you arguing about
2 the merits of their arguments?

3 MR. GEMMINGEN: I'm arguing about the
4 relevance of letting in the items on the first
5 page.

6 JUDGE STANLEY: Okay. I'm going to admit
7 the remainder of the document based on the fact that
8 it may have relevance to the argument that
9 Ms. Mitchell is making and the fact that the witness
10 has testified that he based what he wrote in this
11 memo on the documents that he reviewed for this
12 case. And we will give it the weight it deserves
13 when we deliberate.

14 So I'm going to admit only those portions
15 of 39 that don't relate to discussion of the law.

16 Okay. Is there anything else that you need
17 to address before this witness is released?

18 MS. WEED: No. And I think he has to catch
19 a flight.

20 JUDGE STANLEY: All righty. Then if you --

21 MR. CORNEZ: Oh, I have a couple hours of
22 questions.

23 No, no questions, Your Honor.

24 JUDGE STANLEY: Okay. Then, Mr. Krajewski,
25 you're released. And thank you for being here.

26 MR. KRAJEWSKI: Thank you.

27 JUDGE STANLEY: At this point we can
28 probably break for lunch and give you some time

1 before you have your next witness testify.

2 How long do you think you'd want to break,
3 until 1:00 o'clock?

4 MS. WEED: Yeah, 1:00 o'clock should be
5 fine.

6 JUDGE STANLEY: Franchise Tax Board, are
7 you okay with that?

8 MR. CORNEZ: Yes.

9 JUDGE STANLEY: Okay. We'll recess and go
10 off the record.

11 (Whereupon a break was taken from
12 11:48 a.m. until 1:04 p.m.)

13 JUDGE STANLEY: All right. It looks like
14 everybody's back, so we'll reconvene the hearing in
15 the matter of Sharon Mitchell. And I will ask Ms.
16 Weed to introduce her next witness.

17 Back on the record in the matter.

18 MS. WEED: Yes, I would like to call the
19 Appellant Sharon Mitchell at this time.

20 JUDGE STANLEY: Okay. And would you prefer
21 her to just stay there or --

22 MS. WEED: Where do you want to go?

23 MS. MITCHELL: I'm fine.

24 JUDGE STANLEY: There's copies of the
25 exhibits up there.

26 MS. WEED: Whichever you prefer.

27 JUDGE STANLEY: We don't want you to be
28 uncomfortable, Ms. Mitchell.

1 MS. MITCHELL: Okay. Well, I can stay
2 here.

3 MS. WEED: Okay.

4 JUDGE GEARY: Counsel, just make sure that,
5 even though she's sitting right next to you, that
6 you have her project her voice well enough through
7 the microphone so that everyone can hear.

8 MS. WEED: Okay.

9 JUDGE STANLEY: Okay. Ms. Mitchell, will
10 you please rise and state your name and spell it for
11 the record, please.

12 MS. MITCHELL: Sharon Mitchell, S-h-a-r-o-n
13 M-i-t-c-h-e-l-l.

14 JUDGE STANLEY: Okay. And raise your right
15 hand.

16 Do you swear or affirm that you will tell
17 the truth, the whole truth and nothing but the
18 truth?

19 MS. MITCHELL: I do.

20 JUDGE STANLEY: Thank you.

21 DIRECT EXAMINATION

22 BY MS. WEED:

23 Q. Okay. Sharon, can you please -- what is it
24 that you do for a living?

25 A. I am both an artist and a real estate
26 investor.

27 Q. Okay. And what is your understanding of
28 the 1031 exchange?

1 A. In a 1031 exchange the capital gains is
2 deferred and the ability to continue with your
3 investment is -- it perpetuates it so you continue
4 to grow.

5 Q. Okay. What were the first 1031's that you
6 were exposed to?

7 A. Oh, my mother. That was her -- she was
8 very good at real estate and very knowledgeable and
9 she did a lot of those.

10 Q. Do you remember how far back you remember
11 her doing 1031 exchanges?

12 A. I was, I think, not much more than a child
13 other than -- yeah. She had -- and they were called
14 "Starkers" at the time. But she was doing them
15 then.

16 Q. Okay. In your estimate, how many 1031's
17 did your mother successfully complete over her
18 lifetime?

19 A. I counted them recently, 29. But she lived
20 a long life.

21 Q. And were they all successfully completed?

22 A. They were.

23 Q. In 2007, were you actively involved in
24 partnership discussions?

25 A. Wait. Say that again?

26 Q. In 2007, were you actively involved in
27 partnership discussions?

28 A. No.

1 Q. Was your mom?

2 A. Oh, yes.

3 Q. Did you trust your mom to negotiate on your
4 behalf?

5 A. Very much, yes.

6 Q. Did your mother mentor you with respect to
7 1031 exchanges?

8 A. She did. She always explained what she was
9 up to.

10 Q. How many of the 1031 transactions you have
11 done consisted of a California property being
12 exchanged for an out-of-state property?

13 A. I think out of -- I think there were
14 three.

15 Q. Okay.

16 A. Yeah.

17 Q. Is there anything you can refer to, to
18 refresh your recollection?

19 A. Well, I'm looking here -- I would have
20 totaled these up -- and I wrote a note to myself
21 that in the totality would be three from my
22 lifetime, one, you know (inaudible) --

23 HEARING REPORTER: I'm sorry. I didn't
24 hear the last part of your answer.

25 MS. MITCHELL: Oh, I'm sorry. Three in the
26 totality of my lifetime. In 2007, there would have
27 been one out of the four exchanges was.

28 /////

1 BY MS. WEED:

2 Q. Okay. So one property; is that correct?

3 A. Mm-hmm.

4 Q. How many of the 1031 exchanges that you
5 have completed have been subject to audit?

6 A. Just this one.

7 Q. Are you aware --

8 And you're talking about the Con
9 Med property --

10 A. Oh, I'm sorry.

11 Q. -- at 130 Tampico?

12 A. Yes.

13 JUDGE STANLEY: Can you be careful not to
14 talk over each other because that will be very
15 difficult for our reporter to catch.

16 MS. MITCHELL: Oh, right. Right. I'm
17 sorry.

18 BY MS. WEED:

19 Q. In connection with 130 Tampico Way, are you
20 aware if any of the other partners have been audited
21 at this time?

22 A. I'm not aware of anyone else being
23 audited.

24 Q. Are you aware of whether the partnership
25 reported the whole amount of the sales proceeds for
26 the sale of 130 Tampico Way?

27 A. They reported their share. My share was
28 not part of their tax return.

1 Q. Okay. Do you have experience negotiating
2 real estate transactions?

3 A. Now or then?

4 Q. Now.

5 A. Now? More experience because I've had
6 to.

7 Q. Okay. And what about in 2007?

8 A. No. I really relied heavily on my mother's
9 expertise, and that's the way things were. She was
10 very good at it.

11 Q. Okay. Except for the transaction at issue
12 with respect to 130 Tampico Way, have you converted
13 any other partnership interests in connection with
14 the like-kind exchange in the past?

15 A. No.

16 Q. When did you acquire your partnership
17 interest in Con Med?

18 A. March 1991.

19 Q. At the time that you inherited your
20 partnership interest, do you know -- did you know
21 which property the partnership owned?

22 A. Not really at the time. It wasn't
23 something that was part of my normal statement.

24 Q. Okay. When do you think you became aware
25 that the partnership owned 130 Tampico Way?

26 A. When I -- when they settled the estate and
27 they said, here, here's your thing.

28 Q. So that would have been around 1991?

1 A. Yeah. My mother was the executrix of the
2 estate and she, you know, laid out this, this, and
3 this, and the partnership was included in that.

4 Q. At the time you inherited the partnership
5 interest, do you recall how many partners there were
6 total?

7 A. No, not in 1991, I really don't, no.

8 Q. Okay. What about in 2007?

9 A. In 2007, there would have been 17,
10 including my mom and I.

11 Q. Okay. What was your role in the
12 partnership?

13 A. I had the right to vote.

14 Q. Okay. And what was your mother's role in
15 the partnership?

16 A. She was always, from the inception of the
17 partnership, she was always very actively advising
18 both John Stewart -- or Jack Stewart was the
19 original general partner, and Tom Milner who took
20 over later on, because she had so much more real
21 estate experience than they did. So they were
22 oftentimes calling and asking for advice. And they
23 actually kind of became friends at a certain
24 level.

25 Q. Was your mother heavily involved in the
26 sale negotiations of 130 Tampico --

27 A. Oh, I forgot to say one thing. She was a
28 general -- she was elected to, uh -- what do you

1 call it?

2 JUDGE GEARY: Board?

3 MS. MITCHELL: Executive board, yeah. And
4 that was during the sale.

5 BY MS. WEED:

6 Q. Was she heavily involved in the sale
7 negotiations for 130 Tampico Way?

8 A. Indeed she was.

9 Q. Did you trust your mother's judgment and
10 expertise in handling the negotiations?

11 A. Absolutely.

12 Q. When did you become aware that the
13 partnership was intending to sell 130 Tampico?

14 A. You know, I don't really remember a
15 specific date. I'm sorry. I can't really recall.
16 It would have been pretty early on before the sale.
17 Maybe as early as 2003. I'm going to say 2003.

18 Q. Is there any document you can refer to that
19 might help refresh your recollection?

20 A. Yes. There might be some of the
21 exhibits.

22 Q. I'm going to refer you to Exhibit 41,
23 Appellant's Exhibit 41.

24 A. Okay.

25 Q. Please review the document.

26 A. Okay.

27 Q. Have you seen this document before?

28 A. Yes, I have.

1 Q. What is your understanding of what this
2 document indicates?

3 A. This would have been our general partner
4 Tom Milner, and he would have been e-mailing to
5 everyone that our tenant who had been there for so
6 many years, they're PTLA, they were not -- they
7 basically were not doing well. And they had put
8 some things out on the table like didn't want to
9 partner with them, didn't want to do -- some other
10 changes in how our relationship was.

11 None of the partners were interested in
12 becoming ownership partners and being a kind of
13 outside venture with PTLA. Basically they also were
14 bringing to our attention that there was really like
15 a lot of capital improvements, kind of a big number.

16 JUDGE STANLEY: Ms. Mitchell, I'm sorry to
17 break your flow. But you have a very quick speech
18 pattern.

19 MS. MITCHELL: Oh, I'm so sorry. I'm so
20 sorry. Okay.

21 JUDGE STANLEY: And when you're looking
22 down it's harder to hear your words.

23 MS. MITCHELL: Okay.

24 PTLA had basically asked us for more
25 funding for capital improvements, and none of that
26 was a very exciting thing to hear.

27 Then at that point people -- I think that
28 was when the sale probably came to, you know, my

1 attention, because I know my mom was looking into
2 getting an appraisal. You know, she basically was
3 in charge of that end of it.

4 BY MS. WEED:

5 Q. Okay. And what is the date of that
6 document?

7 A. It's December 7, 2004.

8 Q. All right. And can you please refer to
9 Exhibit 42?

10 A. Okay.

11 Q. Can you -- do you recognize this
12 document?

13 A. Yes.

14 Q. And can you briefly indicate to us what it
15 indicates -- what your understanding is that this
16 document indicates?

17 A. Okay. Let me just read over it just for a
18 second.

19 Okay. So this is just an update from Tom
20 Milner to the partners. And what he is saying is
21 that my mom was doing a little reconnaissance, kind
22 of, contacting PTLA to confirm that they were still
23 in negotiations with John Muir because that's kind
24 of where they were thinking of heading and we needed
25 to know that that was actually still a thing.

26 Q. What do you mean heading to John Muir?

27 A. They were in negotiations to leave a
28 section of a building that was under the umbrella of

1 the John Muir system, and they were pretty serious
2 about it. I mean they were -- they actually had
3 approached Kaiser and Kaiser turned them down.

4 But John Muir was entertaining an idea of
5 having an independent sort of assisted care facility
6 within their system. And as long as they were still
7 in negotiations with John Muir, it was not -- that's
8 the writing on the wall. I mean they're not going
9 to stay with us.

10 Q. You mean the current tenant?

11 A. Yeah, PTLA was our tenant.

12 Q. Okay.

13 A. And so other than -- I mean there's a
14 little aside about people were confused about when
15 the lease was up. That needed to be checked on
16 because they wanted out.

17 It does mention my mom was opposed to
18 selling unless there was no other option. She
19 wasn't selling like a turnover property generally.

20 Q. And what is the date of this document?

21 A. This document is -- it's kind of hard to
22 read that date, but it looks like December of
23 2003.

24 Q. Okay. If you recall, when did you first
25 convey your intent to conduct a 1031 exchange to the
26 partnership?

27 A. Again, I just don't know of an exact date,
28 other than to say that it was always my intention to

1 conduct a 1031 because I don't do business any other
2 way and have never done.

3 Q. To whom did you convey your intent?

4 A. This would have been our counsel, Richard
5 Goodman. I spoke with Tom Milner. The real estate
6 agents that we need to have us help target
7 properties, both in Arizona and in California; that
8 would be John Vickers in California and John Miller
9 in Arizona, and he's someone we eventually went
10 with.

11 Q. Okay. If you know, when did the
12 partnership become aware of your intent to conduct a
13 1031 exchange?

14 A. Again, I don't know an exact date. Chances
15 are it would have been Tom Milner saying something
16 to them. I don't remember meetings with them. I
17 think all this stuff happened with e-mail. So it
18 would have probably been an e-mail that went out.
19 But it was early on.

20 Let me -- may I refer to my notes?

21 Q. If it would refresh your recollection and
22 Judge Stanley approves.

23 JUDGE STANLEY: Certainly. I don't hear
24 any objections.

25 MR. CORNEZ: Well, what notes are these?

26 MS. MITCHELL: I just have a timeline.

27 JUDGE STANLEY: So is that an objection,
28 Mr. Cornez?

1 If somebody refers to a document to refresh
2 their memory, the other party has the right to at
3 least see what -- to what she's referring.

4 So if you want to see that --

5 MR. CORNEZ: I would like to see it.

6 JUDGE STANLEY: Would you mind just passing
7 that over so they can see to what you're referring?

8 MS. WEED: To the extent that this could
9 contain some attorney-client privilege, though, how
10 would that be handled?

11 JUDGE STANLEY: Well, does the document to
12 which she's referring, is that -- are you claiming
13 that that's a privileged document?

14 MS. WEED: There are attorney notes on
15 there, yes. So to the extent that the attorney
16 notes cannot be redacted, I don't think that, as a
17 privileged document, that they have a right to see
18 it if she's fully using it to refresh her
19 recollection and it's not an admitted document.

20 JUDGE STANLEY: Well, so under typical
21 civil law evidence rules they would have the right
22 to see to what she's referring.

23 Since this is an administrative hearing and
24 we like to give leeway to people, I would think that
25 if you'll accept her description of it, of what
26 she's referring to, would that satisfy the Franchise
27 Tax Board?

28 MR. CORNEZ: I would reserve, until I hear

1 the answer, to know whether I would object or not.

2 JUDGE STANLEY: Okay.

3 MS. WEED: So she's not going to read any
4 of it into testimony. I think she just needed to
5 refresh her recollection based on her notes she
6 prepared to testify today.

7 JUDGE GEARY: May I ask a question? Could
8 she refresh her recollection by reference to one of
9 the exhibits that's already been admitted?

10 Counsel?

11 MS. WEED: One moment, please.

12 JUDGE GEARY: Okay.

13 While you're looking, Counsel, I believe
14 you indicated that the document's not being
15 admitted. But it is a document that has to be
16 produced; if the witness's making reference to it to
17 refresh her recollection, it has to be produced for
18 counsel for his review.

19 And it looks to me -- I'm not speculating,
20 but it looks like she's reading questions and
21 answers. Do you want -- if you want her to use that
22 to refresh her recollection, be prepared to produce
23 it for counsel.

24 MS. WEED: Okay. Understood.

25 BY MS. WEED:

26 Q. Okay. So without referring to your notes
27 and if you know, when did the partnership become
28 aware of your intent to conduct a 1031 exchange?

1 A. I can't give you an exact date, but I do
2 know that there are in existence e-mails where
3 general partners mention to the partners that
4 Caroline -- there's a discussion of a 1031 exchange,
5 and that goes back to well before the close of
6 escrow, possibly even back to even a year before. I
7 know there's documents somewhere in that pile that
8 have reference, but I can't tell you an exact date
9 off the top of my head.

10 Q. Once you were made aware of the sale did
11 you have the intent to do a 1031 exchange?

12 A. Absolutely.

13 Q. Was it always your intent to have the
14 partnership buy you out once you were aware of the
15 intent to sell?

16 A. Yes.

17 Q. Why?

18 A. Because we wanted to continue to have an
19 investment that grows. Our income stream was really
20 what we lived on. We didn't live off of capital
21 that you generate from flipping this building. That
22 wasn't a thing for us.

23 Q. Okay. Was there an order to exchange the
24 property?

25 A. Yes.

26 Q. Do you know if the partnership ever agreed
27 to extend the escrow period and date of closing in
28 this transaction?

1 A. Yes, it did.

2 Q. Okay. How do you know?

3 A. There is a Counter-offer to a
4 Counter-offer, maybe even to a Counter-offer that
5 has that as a stipulation. And that -- I do know
6 the date of that document. It's February of 2007.

7 Q. Can you please refer to what has been
8 admitted as Respondent's Exhibit C?

9 A. Exhibit C?

10 Q. Just review it.

11 Do you recognize this document?

12 A. You mean their exhibition list?

13 Q. Exhibit C.

14 A. Oh, I'm sorry. I was reading the wrong
15 thing. Oh, yeah. Yeah. Sorry.

16 Q. And what does this document indicate to
17 you?

18 A. This is the Counter-offer to the
19 Counter-offer.

20 Q. Okay. And what was your understanding of
21 why this Counter-offer was made?

22 A. Well, because we needed to extend the
23 closing to be able to effectively do our 1031.

24 Q. Okay. To the best of your recollection,
25 did Tom Milner ever notify the partners that you
26 intended to do a like-kind exchange?

27 A. Absolutely not.

28 Q. Were you a named seller on the escrow

1 statement?

2 A. Yes.

3 Q. Do you know who else was named as a seller
4 on the escrow statement?

5 A. Caroline Mitchell and Con Med.

6 Q. And yourself, correct?

7 A. Yeah. Me and my mom and Con Med.

8 Q. Did you understand that having your name
9 listed on the closing statement would make you
10 civilly liable as an individual for any issues
11 arising from the actual sale?

12 A. Yes.

13 Q. Did you pay any of the closing costs or
14 escrow fees?

15 A. Yes.

16 Q. Prior to the time 130 Tampico Way was sold,
17 did you record a Deed from the partnership to
18 yourself?

19 A. Yes.

20 Q. Do you recall if a transfer tax was paid at
21 this time?

22 A. Yes, there was.

23 Q. Was a Deed recorded from you to the buyers
24 of 130 Tampico Way?

25 A. Yes.

26 Q. Do you recall who was listed on the Deed?

27 A. All of us or just the sellers?

28 Q. In connection with the transfer of your

1 interest.

2 A. Well, my mom and I were listed as the
3 sellers. And the buyers were -- the PTLA had
4 changed into another entity to buy the property, so
5 it was -- they were calling themselves Tampico
6 Investors and Meadow Investors, LLC.

7 Q. Okay. Did you ever believe redeeming your
8 partnership interests and exchanging it under 1031
9 as an individual would allow you to potentially
10 avoid paying tax?

11 A. No.

12 Q. If you could please refer to Appellant's
13 Exhibit 5.

14 A. Appellant. That's this? That's me.
15 Exhibit 5. All right.

16 Yes, I'm looking at it.

17 Q. Have you seen this document before?

18 A. I have.

19 Q. Did you prepare it?

20 A. Did I prepare it?

21 Q. Yes.

22 A. No.

23 Q. Who did?

24 A. Armanino in Walnut Creek.

25 JUDGE STANLEY: Excuse me. I didn't
26 hear.

27 MS. MITCHELL: Armanino. It's a CPA firm.
28 Armanino, A-r-m-i-n-i-n-o.

1 MS. WEED: A-r-m-a-n-i-n-o.

2 JUDGE STANLEY: Ms. Mitchell, I'm going to
3 just ask you to try to slow down again.

4 MS. MITCHELL: I'm so sorry.

5 JUDGE STANLEY: You just normally talk, you
6 normally talk in a fast pace.

7 MS. MITCHELL: Yeah.

8 JUDGE STANLEY: Especially when you're
9 looking down at documents, it tends to trail off and
10 it doesn't quite work. We can't hear you and get
11 the full benefit of your testimony.

12 MS. MITCHELL: I'm sorry. I'll do
13 better.

14 JUDGE STANLEY: Okay. Friendly reminder.

15 MS. MITCHELL: I know. Thank you.

16 BY MS. WEED:

17 Q. So Exhibit 5, have you seen this document
18 before?

19 A. I have seen it.

20 Q. You said you did not prepare it. You said
21 Armanino did.

22 A. Mm-hmm.

23 Q. Did you review the document when they
24 presented it to you, when they had completed it?

25 A. Yes, I think I did.

26 Q. Did you review it with the person who
27 prepared it?

28 A. You know, that part, I don't remember.

1 Q. Okay. Do you know who you reviewed it
2 with?

3 A. It might have been my mom; she was the
4 executrix of the estate. So I just don't know. I
5 can't give you an answer on that.

6 Q. Okay. So as you sit here today, do you
7 understand what this document indicates?

8 A. Well, I thought it meant the cash basis I
9 had in Con Med, you know, the basis from when my
10 aunt died.

11 Q. Okay.

12 A. And in this, it's so hard to read the date,
13 when she died. But it was March, I know that.

14 Q. Okay.

15 JUDGE STANLEY: Ms. Mitchell, again, you
16 looked down and I don't think I understood a word
17 you just said in that last sentence.

18 MS. MITCHELL: The first page of the
19 exhibit has the date that I acquired the property,
20 which would have been the date of my aunt's death.
21 It's hard to read because the scan is not very good,
22 but it says "1991," and it was March of 1991.

23 BY MS. WEED:

24 Q. And what is the title of this document?

25 A. It says "Like-Kind Exchanges," and it says
26 "Form 8824."

27 Q. Okay. And so if you look at page 2, there
28 are some numbers reported. Do you know what these

1 numbers represent?

2 A. I think I do, yes.

3 Q. And what do you think these numbers
4 indicate?

5 A. Let me move that microphone.

6 Okay, so the first number on line 16 is
7 the -- I think that's the one we were buying, right?
8 Not sure, but I'm thinking.

9 The one on 18 would be the cash -- the
10 basis for Con Med as it would have been on the 1991,
11 you know, my aunt died. And the number below that
12 is, you know, minus that.

13 So what it says at the very bottom is that
14 the new property that I'm going into, in spite of
15 the fact that I'm paying this larger number up
16 there, which normally means that would be your new
17 basis since you just bought it, instead of it being
18 the larger number, it's a smaller number because
19 it's frozen in time. So no matter how much it
20 appreciates or how much equity it ends up having in
21 it, when you sell it your basis is still the number
22 from 1991. So it's like it's frozen in time.

23 Q. Okay. And can you refer to the last number
24 indicated on that page?

25 A. Yeah.

26 Q. I think it's line 25.

27 A. Yeah.

28 Q. Do you have any understanding of what that

1 indicates?

2 A. Well, that would have been the value of the
3 actual physical building at the time of my aunt's
4 passing. Isn't that it? Right there?

5 Q. I'm sorry. Line 24.

6 A. Oh, line 24. That's the amount of what we
7 would -- I mean that's what my part of the building
8 would have been, minus the basis of Con Med.

9 Q. And what do you mean by your part?

10 A. Well, the building itself was bought by my
11 mom and I. So this is half of it. We bought it
12 50/50. We exchanged into it 50/50, which is what we
13 always tended to do. So that just represents my
14 ownership of the 50 percent of the building that
15 we're going to exchange into.

16 Q. Okay. Are you aware that the FTB is
17 claiming the cost basis of the property you
18 exchanged is 29,395?

19 A. I am well aware of that, yes.

20 Q. Do you agree with this assertion?

21 A. No.

22 Q. Why do you disagree?

23 A. Because I didn't sell a share of a
24 partnership of -- a noncontrolling share of a
25 partnership. I sold my equity in a building, in a
26 physical building.

27 Q. Do you have any evidence to support the
28 fact that the basis the FTB asserted against you is

1 incorrect?

2 A. I don't think I do.

3 Q. Okay. Would it refresh your recollection
4 to refer to the retroactive appraisal you had
5 done?

6 A. Oh, God yes, of course. I'm so sorry, I
7 apologize.

8 Yes, of course I do.

9 Q. It's okay.

10 Do you need to refer to that? It's Exhibit
11 26.

12 A. Yes.

13 Q. And can you just briefly tell us why you
14 obtained this retroactive appraisal to 1991?

15 A. I couldn't find the original.

16 Q. Okay. So you believe that there was an
17 original appraisal done --

18 A. Mm-hmm.

19 Q. -- close to 1991 at the time your aunt
20 died?

21 A. I know there was.

22 Q. How do you know?

23 A. Because I found all the others.

24 Q. Okay. Is there any provision in the
25 Partnership Agreement that indicates an appraisal
26 would have been done?

27 A. Uh-huh. There is a clause in the agreement
28 that if somebody dies -- actually, there's kind of

1 an arbitrary appraising of the property if somebody
2 passes.

3 If somebody inherits their share, the
4 partnership also can also have an option to buy them
5 out, at which point also an appraisal would be
6 required. And everybody was doing it. I mean
7 people were dying. They were old because this is in
8 '69.

9 Q. That is the Second Amended and Restated
10 Partnership Agreement that you're referring to?

11 A. I am referring to that agreement.

12 Q. Are you aware of any other specific
13 partners who made 754 elections at the time they
14 inherited their interests?

15 A. Oh, yes, all of them. Yes, they did.

16 Q. Anyone specifically?

17 A. Tom Milner, the general partner.

18 Q. Okay. And how do you know?

19 A. Because he was so nice; when I told him
20 that I couldn't find my appraisal, he sent me his.
21 But it wasn't very useful because it was from 2001.
22 That's years past. But he had an appraisal done.
23 He had done the election. And that's, you know,
24 what people were doing as the older members of the
25 partnership were passing away.

26 Q. Okay. Do you recall the cost basis
27 reported on your return form 8824?

28 A. 260 --

1 Q. Exhibit 5.

2 A. I need to look at that. It's 200 and 60 --
3 I'm going to have to stand up. Two six -- it looks
4 like a six seven four eight. I'm sorry.

5 Q. And what was the fair market value reported
6 on the appraisal, the retroactive appraisal you
7 obtained?

8 A. The entirety of the property would have
9 been worth 2,250,000, which would have put my 10
10 percent at 200,000.

11 Q. Okay. And so is it correct that 10 percent
12 of that would be about 225,000?

13 A. Oh, yeah. Sorry. I did the math wrong.
14 Yes, 225,000.

15 Q. Why do you believe there is this
16 discrepancy of 266,000 versus 225,000?

17 A. You know, I'm amazed it got that close
18 considering it's been so long. I just think it's a
19 time thing.

20 Q. Do you know what the amounts reported on
21 your 8848, do you remember what that amount was
22 based on at the time you reported it?

23 A. Wait, did you say 88 --

24 Q. 8824.

25 A. -- 24. Well, it would have been based on
26 the original appraisal.

27 Q. And when you had the tax return in 2007,
28 your form 1040, prepared by Armanino, did you

1 prepare -- or did you provide the source documents
2 to prepare the return?

3 A. I did not. That would have been my mom.
4 She was the executrix, she handled everything.

5 Q. But for your individual return in 2007?

6 A. Oh, my individual return? I handed them
7 what I had. I don't know -- I don't remember very
8 much about that. I don't think that was my usual
9 thing --

10 Q. Is it your understanding that the --

11 JUDGE STANLEY: Again, Ms. Weed, you two
12 are talking over each other a little bit at the end.
13 So you guys need to be careful about that. We can't
14 catch everything when you do that.

15 MS. WEED: Okay.

16 BY MS. WEED:

17 Q. Is it your understanding that the
18 information indicated on the form 8824 would have
19 been based on information you provided to the
20 accountant?

21 A. Yes.

22 Q. Do you know what a 754 election is?

23 A. Yes.

24 Q. Do you recall if a 754 election was made at
25 the time you claimed you should have received a step
26 up in basis?

27 A. If it was, I just can't find it.

28 Q. Do you have any other information to

1 suggest or to corroborate your belief that you --
2 that a 754 election occurred in 2007?

3 A. The only thing I could think of is that it
4 was required, everyone did it. My mother would not
5 have skipped that.

6 Q. Okay. Did the IRS ever contact you about
7 the 1031 exchange in question?

8 A. No.

9 Q. Did the IRS ever send you correspondence in
10 connection with the 1031 exchange in question?

11 A. No.

12 Q. Do you recall if you reported the 130
13 Tampico property on your Schedule E?

14 A. No, I don't think I did.

15 Q. Why not?

16 A. That -- well, we were reporting all the
17 rental property on a cash basis, which meant that if
18 there were no transactions occurring, you know,
19 expenses, in particular income coming in or expenses
20 being paid out, during that time, there simply would
21 be nothing to report.

22 Q. Did you ever realize any rental income as
23 an individual from the 130 Tampico property?

24 A. I did not.

25 Q. Did you ever have any discussions with your
26 CPA with respect to your 2007 return about how to
27 handle the 130 Tampico investment on your return?

28 A. Not at the time. No, I don't remember

1 discussing it at the time, no.

2 Q. Did your CPA advise you on the transaction
3 and whether there was any income to report on your
4 Schedule E?

5 A. Well, yeah, because it wasn't there. By
6 virtue of the fact that it wasn't there, you know
7 that there's nothing to report.

8 Q. Okay. In 2007, did you understand the
9 steps of a real estate sales transaction?

10 A. I think I did, yeah.

11 Q. What did you -- what did you understand
12 them to be?

13 A. One enters into a sales contract, the buyer
14 puts down enough money. They then have a certain
15 amount of time to do whatever, you know, due
16 diligence they want to do.

17 Negotiations ensue because there's always
18 something. And then as it gets closer to, you know,
19 the closing, that's when all the stuff really
20 happens and then it gets finalized at the closing.

21 Q. Based upon the experiences you've had, when
22 do you believe a sale is executed?

23 A. At the closing.

24 Q. Was this your belief in 2007?

25 A. Yeah, it would be, yeah.

26 Q. Was it your understanding that when the
27 Purchase Agreement was entered into, that the
28 property was sold at that time?

1 A. No, not at all.

2 Q. Were there still negotiations to take place
3 after the Purchase Agreement was entered into?

4 A. Yes, there were.

5 Q. Do you know which negotiations took place
6 after the Purchase Agreement was entered into?

7 A. There was a price change. Basically we
8 went -- let's see. I think we ended up getting a
9 little more for it actually. And then the second
10 was the whole business with having to extend or
11 allowing us to extend the closing so that we could
12 do our 1031.

13 Q. Okay. Why did you effectuate the
14 transaction in question the way that you did?

15 A. I'm not sure I understand exactly what you
16 mean.

17 Q. In connection with the exchange of your
18 interests in 130 Tampico Way and all of the related
19 components of that, why did you do it that way?

20 A. Oh, on advice of counsel.

21 Q. Anything else?

22 A. Well, that's because that's how we do it.
23 I'm not really sure -- I'm kind of still not really
24 sure -- it's a very broad-based --

25 Q. What was your intent in completing the
26 transaction the way you did?

27 A. To do our 1031, continue our income stream
28 from an investment that we had had since 1969.

1 Q. To the best of your recollection, what did
2 your counsel, in connection with this transaction,
3 advise you in terms of completing the transaction?

4 A. He advised us about how to time our
5 documents.

6 Let's see. Just, you know, he told us when
7 we needed to do things, how papers were supposed to
8 be filed.

9 Q. Did you follow his advice?

10 A. Yes, we did.

11 Q. Were you ever advised by a tax
12 professional, CPA or attorney, that you needed to
13 hold the property, as an individual, for a certain
14 period of time before being eligible to conduct the
15 1031 exchange?

16 A. No.

17 Q. Were you ever made aware of any state law
18 which would ever have required you to hold your
19 interest in the property as an individual for a
20 certain period before the 1031 exchange could take
21 place?

22 A. No.

23 Q. After your partnership interest was
24 redeemed, did you record the transfer to you?

25 A. Yes.

26 Q. When?

27 A. Well, it would have been closing, right?
28 I'm thinking that's when that stuff would have

1 been.

2 Q. Did you record a Deed?

3 A. Mm-hmm. Yes. Yes, we did.

4 Q. If you refer to -- if you could please
5 refer to Exhibit 6, Appellant's Exhibit 6.

6 A. Okay.

7 Q. Do you recognize this document?

8 A. Yes.

9 Q. And please briefly indicate what it is?

10 A. It is -- sorry, I have to get closer.

11 Okay. This is Con Med partnership granting
12 to Caroline Mitchell and myself, my mother's
13 8-percent and my 10-percent interest.

14 Q. And what is the date of that Deed?

15 A. Oh, November 29th, 2007. Yes, I can see
16 that.

17 Q. Do you recall if the Lease Agreement with
18 Con Med, that the Lease Agreement with Con Med had
19 with the tenant of 130 Tampico was ever amended
20 after your interest was redeemed?

21 A. No, it was not.

22 Q. And why is that?

23 A. It didn't really make sense. I mean the
24 tenant was the buyer. And everything -- you know, I
25 mean we were so close to closing that reworking a
26 lease that involved signatures of more than 17
27 people, it didn't make sense as a business decision
28 even just to pay someone to do that, especially

1 since the tenant was the buyer. I mean it's not in
2 their interest to do something that's against their
3 lease.

4 Q. Are you familiar with the tax liability
5 asserted against you?

6 A. Yeah.

7 Q. Did you pay this amount?

8 A. I did, if it's the right amount, yes.

9 Q. Do you recall what the amount was?

10 A. Little over 80,000.

11 Q. Okay. If you could please refer to
12 Appellant's Exhibit 45.

13 Do you recognize this document?

14 A. I sure do. Yes, I do.

15 Q. What do you believe it indicates?

16 A. This was the -- this was my notification of
17 what I owed; not just what the original tax would
18 be, but it includes penalties and interest.

19 Q. Okay. And what is that amount?

20 A. It is \$80,702.24.

21 Q. Is it your understanding that this case has
22 been converted to a claim for refund?

23 A. Yes.

24 Q. Do you believe you are a tax-compliant
25 taxpayer?

26 A. I do.

27 Q. What do you base this belief on?

28 A. I try to file very conscientiously. I pay

1 professionals a lot of money to make sure that
2 everything is done correctly and in a timely
3 fashion.

4 MS. WEED: That's all the questions I have
5 at this time.

6 JUDGE STANLEY: Franchise Tax Board?

7 MR. CORNEZ: Yes. Just a few little
8 questions.

9 Did we give the 754 election an exhibit
10 number?

11 JUDGE STANLEY: We marked that as Exhibit
12 47, but we haven't admitted it yet. So for
13 reference, 47.

14 MR. CORNEZ: All right.

15 CROSS-EXAMINATION

16 BY MR. CORNEZ:

17 Q. Ms. Mitchell; is that correct?

18 A. Yes, it's correct.

19 Q. Okay, thank you.

20 Could you please look at Franchise Tax
21 Board's Exhibit A. That is the agreement, the
22 original Agreement of Purchase and Sale.

23 A. Right.

24 Q. And you stated you were familiar with
25 that?

26 A. I am.

27 Q. Is your name listed there?

28 A. I'm sorry, what?

1 Q. Is your name listed anywhere in there as
2 seller?

3 A. Not to my knowledge, no.

4 Q. Would you look at Exhibit B, which is one
5 of the Counter-offers.

6 A. Mm-hmm.

7 Q. Is your name listed anywhere in that as a
8 seller?

9 A. No, it is not.

10 Q. Would you look at Exhibit C, which is
11 another Counter-offer. Is your name listed anywhere
12 in that as a seller?

13 A. No, it is not.

14 Q. Do you know if Exhibit C was the final --
15 was signed by your Con Med partnership?

16 A. Do I know if it was signed?

17 Q. Yes.

18 A. I would imagine it was since the sale took
19 place.

20 Q. You're not aware of another
21 Counter-offer?

22 A. No, no, no. I think this was signed
23 because -- who had it -- one of us -- there was a
24 signed copy floating around.

25 I can't tell you because I don't have it in
26 front of me. I don't know how to speak to that.
27 But I would imagine. Who knows.

28 Q. Were you listed in any documents, given to

1 the buyer, as a seller?

2 A. Just that one -- there was one
3 acknowledgement at the end of the Redemption
4 Agreement where there is a point or the buyer does
5 sign something that has my name on it.

6 Q. Could you look at Exhibit 15?

7 A. At what?

8 Q. Well, I'm seeing how good my memory is
9 here.

10 No, that's not it.

11 JUDGE GEARY: Try 18.

12 MS. MITCHELL: Oh, it was this one, yeah.

13 BY MR. CORNEZ:

14 Q. Could you look at Exhibit I, please?

15 A. Exhibit -- oh.

16 Okay. Well, this is not the document I was
17 thinking of.

18 Q. Would you look at Exhibit I, please.

19 A. Yes.

20 Q. Is there anywhere in that where the buyer
21 acknowledges --

22 A. No, no, no. I misspoke.

23 Q. I realize that, but --

24 A. Yeah. No, I'm sorry. My apologies. I did
25 not get it right.

26 Q. Okay. Could you just look at Exhibit I,
27 please.

28 A. Yes.

1 Q. Is there anywhere in that document where
2 the buyer acknowledges --

3 A. No, there is not.

4 JUDGE STANLEY: Ms. Mitchell, please wait
5 until he finishes asking the question before you
6 answer so --

7 MS. MITCHELL: Okay.

8 JUDGE STANLEY: -- she can get it recorded
9 in order. Thank you.

10 BY MR. CORNEZ:

11 Q. Would you please look at --

12 A. Oh, wait. My mom and my name is on here.

13 Q. Would you look at Exhibit 18, please.

14 MS. WEED: I think she needs time to
15 review.

16 MS. MITCHELL: I'm getting confused between
17 documents and there's so many of them. Can I have a
18 second?

19 JUDGE STANLEY: Yes.

20 MS. WEED: Can you clarify which exhibit
21 we're looking at, please?

22 MR. CORNEZ: Exhibit I.

23 MS. MITCHELL: Okay. So what was the
24 question, again?

25 BY MR. CORNEZ:

26 Q. Is there anywhere in that document that
27 indicates the buyer is aware of the redemption?

28 A. Not that I can see.

1 Q. Could you look at Exhibit 18, please, the
2 last page -- or the second to the last page.

3 A. Oh, it's already open.

4 Okay.

5 Q. Acknowledgement of Receipt of a Copy of
6 Assignment by Buyer.

7 A. Okay.

8 Q. Is that -- the Acknowledgement, is that the
9 first time the buyer knew that you were now the
10 owner of the real property?

11 A. No, because my mother had been in contact
12 with the buyer for a long time.

13 Q. Do you have any documentation of that?

14 A. She was a big phone person. She couldn't
15 type because of her arthritis, so she tended to
16 phone people.

17 Q. How familiar are you with the sort of --
18 for lack of a better word -- the knitty-gritty of
19 1031 transactions in the sense of transferring the
20 old cases to the new property, whether you have new
21 debt, whether there's a change in the value, change
22 in prices, that kind of thing?

23 A. I would have to say that that's what I rely
24 on professionals for. And certainly in 1991,
25 absolutely, I was less involved in this.

26 Q. I'm talking about in 2007.

27 A. Oh, I'm sorry. In 2007, yeah, same thing.
28 I was aware of what was going on. I did get to have

1 conversations about it. I wouldn't dream of trying
2 to do the math.

3 Q. But is it your understanding that the fair
4 market value of the acquired property has to be at
5 least equal to or, if not, greater than the fair
6 market value for property you gave up?

7 A. Well, the thing is we had three buildings
8 we were exchanging, not just Con Med.

9 Q. So this form that we talked about, Exhibit
10 5, I believe it was, which also is much easier to
11 read inside Exhibit 29, which is her actual tax
12 return and there's a copy of it that's not shrunk.
13 So it's a little challenging to find it within the
14 tax return, but it's much easier to read.

15 A. Mm-hmm. So 29?

16 Q. Yeah, Exhibit 29.

17 A. Okay.

18 Q. But I don't know that we need to be looking
19 at it for you to answer my question.

20 A. Okay.

21 Q. You just stated, I believe, that you traded
22 three properties for the Arizona property.

23 A. Well, yeah.

24 Q. And, in fact, the description on the 8824
25 in Exhibit 5 is that you gave up residential rental.

26 A. Well, for the Con Med?

27 Q. Right. But you traded three properties,
28 not just one.

1 A. My recollection is that they were all put
2 into one building.

3 Q. Okay. So that the -- on the second page,
4 the \$266,000 carryover basis that you claimed, was
5 not just for the Con Med property that you gave
6 up -- went for all three properties?

7 A. No, actually, because they weren't sold
8 yet. They sold in 2008.

9 Q. So you did a -- you included the acquired
10 properties on the 2007 return but not the basis?

11 MS. WEED: Objection.

12 MS. MITCHELL: I have no idea what you're
13 asking.

14 JUDGE STANLEY: You'll have an opportunity
15 for rebuttal examination if you're trying to clarify
16 something that --

17 MS. WEED: I don't want her testimony to be
18 misstated. I can tell she's having trouble keeping
19 up. She's also been told to slow down, and she
20 needs to be able to think about her answers.

21 JUDGE STANLEY: Okay.

22 Ms. Mitchell, let me just ask you, feel
23 free to take your time and look at the documents
24 that he's referencing and take the time that you
25 need to refresh your recollection or your
26 understanding before you answer his questions.

27 MS. MITCHELL: Mm-hmm.

28 JUDGE STANLEY: And then, Ms. Weed, if

1 there are any follow-up questions after they're done
2 with the cross-examination, you have the full right
3 to ask her clarification questions that'll help.

4 BY MR. CORNEZ:

5 Q. So you relinquished three properties in
6 2007?

7 A. My mom and I did, took the combination of
8 all of our holdings together to get the other one.

9 Q. And you included all of those on the 2007
10 tax return?

11 A. No. I don't think so. I don't know. This
12 is -- you're asking me a question that I can't
13 really answer because I don't know that much about
14 tax returns. I have no way of knowing. Maybe yes,
15 maybe no. I'm sorry to be so vague, but I'm not a
16 tax professional.

17 Q. So you cannot answer whether or not the
18 \$266,000 basis was attributable just to the
19 partner -- to the Con Med property or whether it
20 included all three properties?

21 A. I don't know. I mean I think it shouldn't
22 have done because the sales of the other two
23 properties weren't in 2007.

24 Q. Can you look at the Exhibit 25. That is
25 the Second Amended and Restated Partnership
26 Agreement.

27 A. Okay.

28 Q. You stated that it provided that if a

1 partner were to transfer his interests that there
2 could be a valuation of the property, I believe is
3 how you phrased it.

4 A. Yeah, I know there was something in it
5 about that. And I know there was something in the
6 original Partnership Agreement about that. It's
7 been a while since I've read this one.

8 Q. What is the date of this agreement?

9 A. 1997.

10 Q. So is it your testimony that the 1991
11 Partnership Agreement had the same provision?

12 A. I'm talking about like the original,
13 original, original. I mean --

14 Q. Well, what was in effect in '91?

15 A. Oh. Oh. I would imagine the original,
16 original, original.

17 MS. WEED: If you know.

18 MS. MITCHELL: If I know -- well, okay.
19 If I don't know, then I don't know.

20 BY MR. CORNEZ:

21 Q. Can you look at page 15, paragraph 39
22 then?

23 A. Okay.

24 Q. So it provides that the partner's interest
25 in the partnership shall be valued and it provides
26 some terms. Would you agree that that's what it
27 says?

28 A. I think it does.

1 JUDGE STANLEY: Just make sure you take
2 your time before you answer --

3 MS. MITCHELL: Okay.

4 JUDGE STANLEY: -- so you can have an
5 opportunity to review what he's talking about before
6 you just agree with him or disagree with him.

7 MS. MITCHELL: Okay. Let me take a second
8 if you don't mind.

9 So how far down am I reading?

10 BY MR. CORNEZ:

11 Q. Probably just the opening sentence.

12 A. Oh, the opening sentence.

13 Q. Without regard to A, B, C and D.

14 A. Oh, wait. May I read it out loud and you
15 can tell me whether this is the right thing?

16 Q. Sure.

17 A. It says, "Valuation by procedure. The
18 value of a partner's interest in the partnership for
19 purpose," it says, "of paragraphs 31, 32 and 35 of
20 this amended agreement shall be determined by
21 appraisal as follows..."

22 Q. Correct. So you testified that you
23 inherited a partnership interest from your aunt; is
24 that correct?

25 A. My understanding was that the partnership
26 interest is partially based on the value of the
27 property.

28 Q. That wasn't my question.

1 A. Oh, okay.

2 Q. My question was, you inherited a
3 partnership interest from your aunt?

4 A. I suppose I did, yeah.

5 Q. You did not inherit a direct ownership in
6 the underlying real estate?

7 A. I thought I did, actually. But I
8 apparently, according to you, I didn't.

9 Q. So the valuation of the real estate owned
10 by Con Med is not the same thing as a valuation of a
11 partnership interest?

12 A. That's true, yes, that's very true --
13 I don't know actually. You're asking
14 questions that I don't necessarily have the means to
15 answer.

16 Q. Okay. Have you read the appraisal that you
17 thought was in March, I guess it was?

18 A. The only thing I read was the first number
19 of it and I was like, "Yay."

20 Q. Well, did you -- well, you didn't read it,
21 okay.

22 I have one more question. Could you look
23 at Exhibit 30, please?

24 A. Can you just give me a second, please? I
25 need to turn this phone off, please.

26 Q. Okay, sure.

27 A. Thank you.

28 Q. Technology, huh?

1 A. I put it on vibrate and it still -- and
2 then my watch chimes in on everything.

3 Q. Can you look at Exhibit 30, please. And
4 can you tell us what your understanding of Exhibit
5 30 is?

6 A. Oh, this would be the First American
7 Exchange Company. And it's the -- it's listing this
8 part of the exchange. And I think the rest of it
9 is --

10 Am I just talking about the first page?

11 Q. Well, the whole thing actually. Just
12 generically, what the whole thing is.

13 A. It is -- they're exchange documents.

14 Q. Okay. That's fine.

15 Well, let's see. Page 6, at the top, and
16 page 7, at the top; could you look at those two
17 pages?

18 So starting with page 7, it shows seller's
19 charges and seller's credit. I'm pretty sure all of
20 us who've done real estate find escrow
21 reconciliation complicated.

22 A. Mm-hmm.

23 Q. But it shows that there's a line item
24 called prorations; do you see that?

25 A. Mm-hmm.

26 Q. And it shows rents, what looks basically
27 one day?

28 A. Huh.

1 Q. So the monthly rent, I presume, looks like
2 it was \$17,500 a month, so one day is \$583.87.

3 Do you understand what that means, the
4 seller's charge is \$583?

5 A. Well, actually not really. I haven't
6 really looked at this, to understand it.

7 Well, I mean -- I don't know. I'm so
8 sorry. I really don't know what that's all about.

9 Q. Can you then look at page 6. The same line
10 "prorations" -- or what -- page 6 looks to be, if
11 this is your page, it says seller is "Sharon
12 Mitchell, trustee."

13 A. Mm-hmm.

14 Q. And it shows for prorations, rent
15 prorations as charged to you of \$58. Do you know
16 what that is?

17 A. No, I don't actually. No, I don't quite
18 understand what that is.

19 MR. CORNEZ: I have no further questions.

20 JUDGE STANLEY: Okay. Do you have some
21 follow-up rebuttal questions?

22 MS. WEED: Just like two or three.

23 REDIRECT EXAMINATION

24 BY MS. WEED:

25 Q. Sharon, if you could please refer, once
26 again, to Respondent's Exhibit C. And just briefly,
27 do you recognize this document?

28 A. Yes.

1 Q. And briefly, what does it indicate?

2 A. It indicates that the -- it's a
3 Counter-offer to all the other offers, and it has to
4 do with the ability to, instead of having the
5 closing date at August 31st, 2007, the closing date
6 is extended 60 days so that we could do our 1031
7 exchange. So the new closing date is 60 days
8 longer.

9 Q. Okay. And what is the date of this
10 document?

11 A. The date of this document is February 26,
12 2007.

13 Q. Okay.

14 And can you please also refer to
15 Respondent's Exhibit B. And do you recognize this
16 document?

17 A. Yes. Yes, I recognize this.

18 Q. Please briefly indicate what this document
19 indicates?

20 A. It's another one of the counters to the
21 counters. And it has the offer is modified to
22 increase the purchase price from 6,200,000 to
23 6,400,000.

24 Q. And what is the date of this document?

25 A. The Offer to the Counter-offer to the
26 Counter-offer to the Counter-offer to the
27 Counter-offer to the Counter-offer -- I'm sorry, my
28 apologies.

1 It is -- this is really hard to read.

2 Oh, it's down here. I'm sorry. I was
3 reading the top of the thing.

4 It was dated February 6th, 2007.

5 Q. So is it safe to say that the partnership
6 knew of your intent to do a like-kind exchange at
7 least as early as February 2007?

8 A. Yes, it is.

9 Q. And is it safe to say that in February 2007
10 negotiations were still ongoing?

11 A. Yes.

12 MS. WEED: Okay. I have no other questions
13 at this time.

14 JUDGE STANLEY: Mr. Cornez, do you have any
15 follow-up?

16 MR. CORNEZ: No, thank you.

17 JUDGE STANLEY: Judge Rosas, do you have
18 any questions?

19 JUDGE ROSAS: I do, Judge Stanley. Thank
20 you.

21 Good afternoon, Ms. Mitchell. How are you?

22 MS. MITCHELL: Fine.

23 JUDGE ROSAS: First of all, thank you for
24 your patience during these inquiries. We appreciate
25 your time.

26 And it's especially difficult coming down
27 here at lunch.

28 MS. MITCHELL: This is true.

1 JUDGE ROSAS: Ms. Mitchell, earlier you
2 were speaking of your mother and her extensive
3 knowledge and background, and I'm just trying to get
4 a sense of whether there were any formal
5 arrangements in which she was able to represent you
6 in these negotiations?

7 MS. MITCHELL: Well, insofar as she was on
8 the executive board, she had her fingers on the
9 pulse of the entire thing. And she -- I mean I
10 think of that as being, you know, as pretty
11 official. I don't think it gets any better than
12 that.

13 If I may say, she was offered the general
14 partnership and she had to decline it because her
15 health was beginning to go. But they thought highly
16 enough of her to make her the offer.

17 JUDGE ROSAS: And in terms of the
18 negotiations that took place, I realize there was
19 some correspondence from Mr. Milner that indicates
20 that ballots were included to the partners for their
21 vote.

22 MS. MITCHELL: Mm-hmm.

23 JUDGE ROSAS: Did you personally sign those
24 ballots or did your mother sign those on your
25 behalf?

26 MS. MITCHELL: I signed -- I think I signed
27 all of them on my own.

28 JUDGE ROSAS: And my next question, just

1 for clarification, is actually for your counsel.

2 Mrs. Weed, just to be clear, we did not
3 receive any copies of any partnership or partner
4 ballots; is that correct?

5 MS. WEED: I don't believe so.

6 JUDGE ROSAS: That's my understanding as
7 well, but I just wanted to be clear.

8 And Ms. Mitchell, just in terms of trying
9 to get a better sense of your mother's role as a
10 representative for you, were there any official
11 documents, for example, a Power of Attorney that
12 provided her with the ability to sign over --

13 MS. MITCHELL: Absolutely. She had my
14 Durable Power of Attorney. She could've done
15 whatever she wanted to. We actually had each
16 other's Power of Attorneys, but I certainly didn't
17 utilize mine over her because why would that happen?

18 But no, she had my Power of Attorney,
19 absolutely.

20 JUDGE ROSAS: And just to be clear, was
21 that a written Power of Attorney?

22 MS. MITCHELL: It was. It was very
23 ironclad. It was written by Richard Goodman. It
24 was a Durable Power of Attorney. It was the real
25 thing.

26 JUDGE ROSAS: Do you recall when that
27 Durable Power of Attorney was executed?

28 MS. MITCHELL: I don't really recall. I

1 know it was in play. It was certainly a valid
2 document.

3 JUDGE ROSAS: And Mrs. Weed, just to be
4 clear, we did not receive a copy of that Durable
5 Power of Attorney, correct?

6 MS. WEED: I don't believe so.

7 JUDGE ROSAS: I would like to refer your
8 attention to what has been admitted as Exhibit 3,
9 please.

10 MS. MITCHELL: If you let me have just a
11 minute.

12 JUDGE STANLEY: I'm sorry. I didn't
13 understand that.

14 MS. MITCHELL: Can I have just a couple of
15 minutes?

16 JUDGE STANLEY: Absolutely. Take your
17 time.

18 JUDGE ROSAS: Of course.

19 And if it helps in any way, I'm just going
20 to ask you about that second paragraph.

21 MS. MITCHELL: The second paragraph, okay.
22 Are you talking about the one that just
23 says "assuming the sale"?

24 JUDGE ROSAS: That is correct.

25 MS. MITCHELL: Okay.

26 JUDGE ROSAS: So, first of all, what is
27 Exhibit 3?

28 MS. MITCHELL: It is an e-mail from our

1 general partner Tom Milner to our partners, and it's
2 dated July 22nd of 2005.

3 JUDGE ROSAS: And did you receive a copy of
4 this e-mail around July 22nd, 2005?

5 MS. MITCHELL: Yeah, absolutely.

6 JUDGE ROSAS: And Ms. Mitchell, my question
7 is, perhaps you can clarify, in that second
8 paragraph there's a discussions about an assumption
9 that if the sale of the property comes to pass, and
10 then in parentheses it says a "big if." And I'm
11 just wondering if you can provide some testimony in
12 terms of the context of why was there doubt that a
13 sale might take place?

14 MS. MITCHELL: I do remember there was some
15 vexing exchanges about price and deferred
16 maintenance. That there was a lot of deferred
17 maintenance on the building. But I don't remember
18 anything past that, I'm sorry.

19 JUDGE ROSAS: So just to be clear, other
20 than some of the back and forth regarding deferred
21 maintenance and the cost, you don't recall anything
22 else regarding the "big if" as referred to?

23 MS. MITCHELL: I have a feeling that Tom
24 was, you know --

25 Okay. You're right. I don't know. I
26 should not speak to this because I'm about to start
27 guessing.

28 JUDGE STANLEY: Let me say, while he's

1 checking it, I understand you're trying to be very
2 helpful, both with Mr. Cornez and Judge Rosas, but
3 you have a perfect right to say "I just don't
4 remember that" or "I don't know."

5 MS. MITCHELL: Thank you. I'm also losing
6 my voice. I think I do want some tea actually.

7 JUDGE ROSAS: On that note, I'll take a
8 drink of water while you drink.

9 If you could refer to Exhibit 44, please.

10 MS. MITCHELL: Okay.

11 JUDGE ROSAS: And what is Exhibit 44?

12 MS. MITCHELL: May I have a second?

13 JUDGE ROSAS: Of course.

14 MS. MITCHELL: Okay. I think I've absorbed
15 as much as I can.

16 JUDGE ROSAS: And of course you can refer
17 to it for your recollection. My primary question
18 is, my first question, what is Exhibit 44?

19 MS. MITCHELL: It is an e-mail from Tom
20 Milner, our general partner, to the partners. And
21 it is an update of the status of our offer from
22 PTLA, the current tenant who was the buyer. And
23 it's saying that -- it's listing pros and cons of
24 the current offer that was on the table at the time
25 and just going through some points that had come up
26 in conversations with partners, you know, wanting to
27 do different things and having certain questions and
28 issues.

1 JUDGE ROSAS: And this e-mail, which was
2 dated January 5th, 2007, did you receive that
3 e-mail?

4 MS. MITCHELL: I did.

5 JUDGE ROSAS: And I notice that the e-mail
6 references a phone conference that took place
7 apparently two days prior, so that would be
8 Wednesday, January 3rd, 2007. Were you a part of
9 that phone conference?

10 MS. MITCHELL: I believe that would also
11 have been my mom.

12 JUDGE ROSAS: So you have no recollection
13 of whether you took place -- I mean, whether you
14 were involved with that phone conference?

15 MS. MITCHELL: I can't remember.

16 JUDGE ROSAS: In the e-mail there's a
17 reference that during the meeting there was a
18 discussion about breaking up the partnership into
19 tenancy-in-common interests, but there was a concern
20 that one party break out of the deal by changing his
21 or her mind during escrow.

22 I realize that you may have testified that
23 you were not in attendance during that phone
24 conference, but by any chance did you have any
25 conversations with your mother regarding these
26 reservations that someone had?

27 MS. MITCHELL: I don't recall having a
28 conversation about it at all actually.

1 JUDGE ROSAS: As I mentioned, in that
2 e-mail Mr. Tom Milner makes a reference to breaking
3 up the partnership and transferring
4 tenancy-in-common interests to former partners.

5 In your situation, your tenancy-in-common
6 interest was given to you about 11 months after this
7 e-mail. Do you know why there was such a delay
8 between the transfer of your tenancy-in-common
9 interest after this meeting?

10 MS. MITCHELL: Yes, actually I do. The
11 partnership -- this might seem a little long-winded.
12 But the original partners in 1969, they knew each
13 other really well and there was a lot of trust
14 involved with that.

15 Over the years those older members, very
16 much like my aunt, had passed away. So we had a
17 whole new generation of people who didn't know us.
18 And when it was, you know, early on when we started
19 saying, okay, we want to drop out of the
20 partnership, there were just a few members who said,
21 well, who are these people? You know, what are they
22 going to do that's going spoil -- I think the term
23 "muddying the waters" came up, that it would be
24 muddying the waters.

25 And because there was also -- there were a
26 few sticking points. It's not an accident that Tom
27 said, you know, it's a "big if." There were just a
28 few points where it looked like maybe this wasn't

1 even going to happen. And the last thing that these
2 guys -- I'm sorry, "guys" -- the last thing that
3 these other members of the partnership wanted was to
4 have a couple of wildcards, as far as they could
5 tell, running amok. That was a concern, and that's
6 what I -- I remember that very specifically.

7 JUDGE ROSAS: And before I move on from
8 this exhibit, the e-mail also mentions that the
9 partnership would present a Counter-offer the
10 following week. And, in fact, it seems like Con Med
11 did present a Counter-offer.

12 By any chance did you have any involvement
13 in the making of that Counter-offer, or did perhaps
14 your mother, representing you?

15 MS. MITCHELL: It'd be my mom.

16 JUDGE ROSAS: And what was her involvement
17 with the terms of that Counter-offer?

18 MS. MITCHELL: I can't specifically say
19 what it would have been, but she was a heck of a
20 negotiator.

21 JUDGE ROSAS: I'd like to now refer your
22 attention to Exhibit 36. Ms. Mitchell, what is
23 Exhibit 36?

24 MS. MITCHELL: May I take a moment?

25 JUDGE ROSAS: But of course.

26 MS. MITCHELL: Am I reading the whole thing
27 or just like a specific?

28 JUDGE ROSAS: No, I'm just asking if you

1 can just clarify what is this Exhibit 36.

2 MS. MITCHELL: Well, I can tell you what it
3 is, but I haven't finished reading it. It is an
4 indication from the general partner to the partners,
5 telling them that he has -- our partnership has an
6 agreement. It does have some contingencies.

7 JUDGE ROSAS: And this Exhibit 36 is dated
8 March 2nd, 2007, correct?

9 MS. MITCHELL: It is.

10 JUDGE ROSAS: Do you recall receiving a
11 copy of this shortly after that date from
12 Mr. Milner?

13 MS. MITCHELL: I would have, yes. I don't
14 recall, but it would be unlikely that I wouldn't
15 have gotten it.

16 I'm sorry, I really don't remember.

17 JUDGE ROSAS: That's fine, Ms. Mitchell.

18 MS. MITCHELL: Yeah.

19 JUDGE ROSAS: No worries. Like my esteemed
20 colleague Judge Stanley mentioned, we'd rather you
21 not speculate or try to guess.

22 You don't recall?

23 MS. MITCHELL: Yeah.

24 JUDGE ROSAS: You don't recall. It did
25 happen in 2007.

26 MS. MITCHELL: Yes.

27 JUDGE ROSAS: Just for purposes of
28 clarification, in that second paragraph it lists --

1 it says that the contract had been signed. And it
2 lists -- I'm sorry, it states that the contract
3 consists of five separate documents.

4 MS. MITCHELL: Mm-hmm.

5 JUDGE ROSAS: The first one has already
6 been admitted as Exhibit A. Number 2 is a
7 Counter-offer.

8 And just for purposes of clarification,
9 Mrs. Weed, we did not receive number 2, correct?

10 MS. WEED: I don't believe so. I don't
11 believe we could locate that one.

12 JUDGE ROSAS: Okay.

13 Number 3 is a Counter-offer by the
14 Purchaser. And also for clarification purposes,
15 Mrs. Weed, we did not receive a copy of that
16 Counter-offer by the Purchaser, correct?

17 MS. WEED: Is that number 3?

18 JUDGE ROSAS: Correct.

19 MS. WEED: I'm not sure which three of
20 those are the two that have been provided based on
21 that description.

22 I don't believe we have one titled number
23 five.

24 JUDGE ROSAS: One of the Exhibits Number 4
25 refers to Exhibit B, and Number 5 on that list
26 refers to Exhibit C.

27 MS. WEED: They're not titled the same
28 thing, so I'm not certain.

1 JUDGE ROSAS: Ms. Mitchell, do you know if
2 the contract was amended after the February 26, 2007
3 Counter-offer?

4 MS. MITCHELL: I don't think I can say that
5 off the top of my head.

6 Okay. I'm getting a little confused.
7 Whenever you start saying the Counter-offer to the
8 Counter-offer to the Counter-offer, it just sounds
9 like Monty Python.

10 JUDGE ROSAS: Thank you for that extra
11 Counter-offer.

12 MS. MITCHELL: I know I did.

13 JUDGE ROSAS: Ms. Mitchell, I notice that
14 we've been going for an hour and a half. I know
15 that our wonderful court reporter/stenographer needs
16 a break, as well as our OTA staff, and I'm sure the
17 rest of the people in the audience.

18 If, Judge Stanley, maybe perhaps we can
19 take a brief break.

20 JUDGE STANLEY: It depends. Do you have a
21 substantial number of questions remaining? If
22 you're getting close to the end, I'd rather wait
23 until after that.

24 JUDGE ROSAS: I do not believe I'm getting
25 close to the end.

26 JUDGE STANLEY: Okay. All right. Then
27 let's take a 10-minute break and give people a
28 little rest in between.

1 (Whereupon a break was taken from
2 2:30 p.m. until 2:40 p.m.)

3 JUDGE STANLEY: We're going to go back on
4 the record in the hearing of the matter of Sharon
5 Mitchell.

6 And Judge Rosas would like to ask a few
7 more questions.

8 JUDGE ROSAS: Thank you, Judge Stanley.

9 Ms. Mitchell, during the examination by
10 Mr. Cornez, he discussed Exhibits A, B and C, which
11 are the Purchase and Sale Agreement and two
12 Counter-offers. And he discussed how your name does
13 not appear as a seller on any of those three
14 documents.

15 Now, my -- before I ask my question, I just
16 want to give a little bit of background, which may
17 assist you in answering the question.

18 So we have this contract, which lists one
19 seller, Con Med, and one buyer, PTLA Corp. The last
20 Counter-offer is dated at the end of February, I
21 believe February 26, 2007. Then nine or ten months
22 later when you signed the Grant Deed over, obviously
23 you're listed on that Grant Deed as the seller, and
24 now we have two new buyers, not PTLA, two different
25 entities.

26 So I'm hoping that you can walk us through,
27 because we don't have any amended agreements or
28 contracts, I'm hoping that you can walk us through

1 what happened at the end of February 2007 when the
2 agreements were just between Con Med and PTLA Corp.,
3 to what happened nine, ten months later when
4 eventually now we have three sellers, you, the
5 partnership, your mother and two new entities. I'm
6 hoping that you can provide a timeline and details
7 in terms of how that change came about.

8 MS. MITCHELL: Are you talking -- I guess,
9 are you asking if I knew about the kind of
10 interworkings of the PTLA and the other entities?

11 JUDGE ROSAS: Not necessarily. I'm just
12 hoping that you can explain the change within those
13 nine and ten months, because, as I mentioned, we
14 don't have any documentation, we don't have any
15 amended agreements. So if you could, with your
16 testimony, walk us through how the agreement morphed
17 from back into one seller and one buyer to having
18 three sellers and two buyers nine months later?

19 MS. MITCHELL: I kind of can't actually. I
20 don't remember the manifestation of their change to
21 being something other than what they originally
22 were. I don't remember that.

23 JUDGE ROSAS: Can you at least speak to the
24 change in regards to the sellers? Do you know how
25 during that nine- or ten-month timeframe how it
26 changed from just having Con Med listed as a seller
27 to having you, Con Med, and your mother listed on
28 that Grant Deed?

1 MS. MITCHELL: Well, because we redeemed,
2 you know -- we redeemed our interests.

3 JUDGE ROSAS: And do you know at what time
4 period within those nine months was the buyer made
5 aware that there would be a change in the identities
6 of the sellers?

7 MS. MITCHELL: I don't remember that.

8 JUDGE ROSAS: Ms. Mitchell, with all the
9 back-and-forth negotiations was there a moment when
10 you knew with certainty that this transaction would
11 close?

12 MS. MITCHELL: I don't remember like some
13 sort of epiphany happening, no.

14 JUDGE ROSAS: Thank you, Ms. Mitchell. I
15 don't believe I have any more questions at this
16 time.

17 JUDGE STANLEY: Judge Geary, do you have
18 any?

19 JUDGE GEARY: Yes, I do. Just a few.

20 Ms. Mitchell, the Redemption Agreement
21 through which you received the undivided interest in
22 the real property, who prepared that? If you know.

23 MS. MITCHELL: It was Richard Goodman.
24 Richard Goodman.

25 JUDGE GEARY: Okay. And was Mr. Goodman
26 the attorney that you made reference to earlier who
27 you indicated was telling you how to go about this
28 process?

1 MS. MITCHELL: He was the attorney for all
2 of us. He was the attorney for Con Med, for the
3 whole partnership, and he was our attorney who
4 handled all of our 1031 exchanges, going back to the
5 '80s.

6 JUDGE GEARY: And when you say "our," you
7 mean yourself and your mother?

8 MS. MITCHELL: My mom's and mine. Our
9 personal. Attorney to the partnership, personal
10 attorney for our 1031 exchanges, and we had a very
11 longstanding client, you know, relationship with
12 him.

13 JUDGE GEARY: Okay. And did Mr. Goodman
14 keep you apprised of any developments that occurred
15 with respect to the sale between the date of the
16 February 26, 2007 offer and the day on which the
17 Redemption Agreement was first presented to you?

18 MS. MITCHELL: Personally, I'm -- it's more
19 likely that he --

20 Again, speculation.

21 I'm just going to run aground on this kind
22 of question. It's been a very, very long time.

23 JUDGE GEARY: Okay. Well, the response "I
24 don't know" is entirely appropriate if you do not
25 know or do not remember.

26 MS. MITCHELL: I don't know.

27 JUDGE GEARY: I gather that it's possible
28 that he might have talked to your mom and your mom

1 talked to you?

2 MS. MITCHELL: That is the more likely
3 scenario.

4 JUDGE GEARY: Was that typically how you
5 gained information about how these real estate
6 investments were developing?

7 MS. MITCHELL: Yeah. I would have to
8 answer "yes" to that.

9 JUDGE GEARY: Okay. So you're reasonably
10 confident that Mr. Goodman prepared that Redemption
11 Agreement, correct?

12 MS. MITCHELL: Yes, I know he did.

13 JUDGE GEARY: Do you have any recollection
14 of how or where or when it was first presented to
15 you for signature?

16 MS. MITCHELL: No, I don't.

17 JUDGE GEARY: It's -- did you ever -- do
18 you recall ever being concerned about timing, about
19 when the sale was going to take place or --

20 Let me ask you this question first: Before
21 the Redemption Agreement was presented to you, did
22 you already know that there was going to be a
23 redemption whereby your partnership interests would
24 be redeemed for an undivided interest in the real
25 property?

26 MS. MITCHELL: I think that was the plan
27 all along.

28 JUDGE GEARY: Okay. So you did expect that

1 to happen?

2 MS. MITCHELL: Yeah.

3 JUDGE GEARY: And you expected that to
4 happen before the conclusion of the sale to the
5 buyer?

6 MS. MITCHELL: Yes.

7 JUDGE GEARY: And were you aware -- let's
8 see. Were you ever concerned about why it was
9 taking so long for the sale to conclude?

10 MS. MITCHELL: I don't remember being
11 worried about it at all, to be honest.

12 JUDGE GEARY: Were you continuing to
13 receive the benefits of your partnership share?

14 MS. MITCHELL: Yeah, I believe I was still
15 getting my checks.

16 JUDGE GEARY: So the income stream was
17 continuing --

18 MS. MITCHELL: Yeah.

19 JUDGE GEARY: -- and you weren't worried
20 about it?

21 MS. MITCHELL: I was not.

22 JUDGE GEARY: Okay. Do you recall if when
23 the Redemption Agreement was first presented to you,
24 you knew that the sale was about to close?

25 MS. MITCHELL: Yes.

26 JUDGE GEARY: Were you ever concerned about
27 the timing, the relatively short period of time
28 between the Redemption Agreement and the sale

1 closing?

2 MS. MITCHELL: No, I felt reassured that my
3 attorney was flying the airplane.

4 JUDGE GEARY: Did he ever specifically --
5 did you ever ask him about that particular issue,
6 the timing?

7 MS. MITCHELL: I did not.

8 JUDGE GEARY: You were simply confident
9 that he was handling it?

10 MS. MITCHELL: Oh, yeah. We worked with
11 him for years.

12 JUDGE GEARY: You mentioned that your
13 mother had a Power of Attorney for you and you had a
14 Power of Attorney for her.

15 MS. MITCHELL: I did.

16 JUDGE GEARY: Do you know whether the other
17 partners were aware that your mother had a Power
18 of Attorney -- had your Power of Attorney?

19 MS. MITCHELL: I don't know that.

20 JUDGE GEARY: Those are all the questions I
21 have. Thank you.

22 MS. MITCHELL: Mm-hmm.

23 JUDGE STANLEY: And I want to thank you for
24 your patience with all of us. When we've got panels
25 of three, it may seem like we're grilling you and
26 we're just -- I think what we're trying to
27 accomplish here is just to fill in the gaps so we
28 can make a reasoned decision in your case.

1 And just as a follow-up to the ones that
2 you've already answered, I just had just a couple
3 more.

4 You talked about an appraisal back when
5 the -- when you transferred your share, an earlier
6 appraisal of the property. Do you actually see that
7 appraisal?

8 MS. MITCHELL: I saw a stack of
9 appraisals.

10 JUDGE STANLEY: Okay. So you know that --
11 you believe it to have been in there?

12 MS. MITCHELL: The appraisals were done of
13 all the properties for the estate tax.

14 JUDGE STANLEY: Okay. And you also talked
15 about -- you also talked about the fact that there
16 was some concern about -- by the older partners
17 about some people maybe doing things that they
18 didn't agree with. I don't want to put words in
19 your mouth.

20 MS. MITCHELL: It would be the -- I'm
21 sorry, if you would like some clarification --
22 younger partners.

23 JUDGE STANLEY: Okay.

24 MS. MITCHELL: The older people were
25 altogether. In 1969 when they made their original
26 investment, they were -- I don't want to use the
27 word "buddies," but they were, you know, they were
28 good with each other. And as people passed away,

1 then you had people inherit their share and then
2 they didn't know -- we haven't met them and they
3 haven't met us. And I think they were the ones who
4 might have been concerned. That's all I can think
5 of, because I know the rest of the people were good
6 with it.

7 JUDGE STANLEY: Did you get that
8 information from discussions amongst the partners,
9 or did you get that relayed to you?

10 MS. MITCHELL: Just from my mom because she
11 knew everyone. She's, you know, since 1969, you
12 know, they've been doing this and I think they were
13 good with each other.

14 JUDGE STANLEY: Okay. And then just one --
15 well, two little quick ones. You mentioned the
16 Power of Attorney that your mother had, and you said
17 you don't recall the date that it was signed. Do
18 you recall the time reference, a year?

19 MS. MITCHELL: If I had my phone on, I
20 could actually probably find it.

21 JUDGE STANLEY: You have a copy of the
22 actual Power of Attorney on your phone?

23 MS. MITCHELL: I have it on a cloud. If I
24 can get it to work. My reception isn't so great. I
25 know for a fact that I have that document.

26 JUDGE STANLEY: Okay. But you don't
27 remember whether it was last year or years ago?

28 MS. MITCHELL: No, it would have been

1 current with the transactions.

2 JUDGE STANLEY: Okay. So you specifically
3 did the Power of Attorney in anticipation of what
4 we're talking about here?

5 MS. MITCHELL: No, not at all. The Power
6 of Attorney had been in effect for a while. We gave
7 each other our Powers of Attorney for all kinds of
8 things.

9 JUDGE STANLEY: Okay. So when you say "for
10 a while," for a while prior to this transaction?

11 MS. MITCHELL: Yes. It existed prior to
12 the transaction. And in both of our instances it
13 was something that we considered a necessary thing
14 to have in case of anything.

15 JUDGE STANLEY: Okay. One last question.
16 Do you still own the Arizona property?

17 MS. MITCHELL: I do.

18 JUDGE STANLEY: Okay, thank you.

19 MS. MITCHELL: Thank you.

20 JUDGE STANLEY: Ms. Weed, do you have
21 follow-up rebuttal questions now?

22 MS. WEED: Yes, I do.

23 REDIRECT EXAMINATION (cont'd)

24 BY MS. WEED:

25 Q. Just to quickly clarify, Sharon, do you
26 recall if the DPOA was in effect prior to 2007?

27 A. It was.

28 Q. So with respect to -- you know, there's

1 been a lot of talk about your partnership interest
2 and when that was redeemed and when the Deeds were
3 recorded. And, you know, we've also talked about
4 the fact that there were ongoing negotiations as
5 much as you can recall.

6 So if you wanted to do this 1031
7 exchange -- which we have corroborating evidence
8 indicating that you do or you did -- why did you
9 wait to drop your partnership interest?

10 A. We waited because the idea of having two of
11 us -- and like I mentioned, there were some new
12 partners who didn't know us and, sadly, worried that
13 we were crazy people or something. So if we had
14 redeemed our partnership interests early on and
15 pursued negotiations over here on the side, the
16 people that were worried about that, they weren't
17 cool with it.

18 And to -- I mean, as I have mentioned, the
19 attorney that was handling the partnership and the
20 sale and everything, Richard Goodman, he was also
21 our exchange attorney and it was suggested that we
22 not drop out.

23 The redemption of our Partnership
24 Agreement, our partnership interest is contingent on
25 the close of escrow, so that we couldn't, you know,
26 go fool around over here or do something that would
27 spoil it for the rest of the people. That's pretty
28 much why we waited. That's the only reason why we

1 waited. There was no other reason to not drop out
2 sooner except for that.

3 Q. Well, didn't you testify that in 2007 there
4 were approximately 17 partners?

5 A. I believe that there were.

6 Q. Do you believe that all of these partners
7 were involved in the negotiations actively?

8 A. No, I know they weren't.

9 Q. Was there any concern about having so many
10 different parties negotiating; you know, did the
11 partnership have that concern?

12 A. Well, I think it probably -- my take on it
13 is yes.

14 I hate to say this, it's going to sound
15 really insulting, but some of those people that were
16 on board at that point just weren't good or savvy
17 about how to conduct something like this. My mom
18 was. Tom was decent; he knew what he was doing.

19 You know, the input that they were getting,
20 the concerns were addressed on a first-come
21 first-serve basis. But I don't remember anyone
22 being encouraged to go down and meet with PTLA and
23 say, hey, by the way, let's do something on our own.
24 No way.

25 Q. So you have also indicated you intended to
26 do a 1031 exchange during this whole process. Did
27 you believe during -- in 2007 or during these
28 negotiations that your interests were aligned with

1 those of the partnership?

2 A. Yes.

3 Q. Okay. Did your mother actually get
4 involved in the negotiations?

5 A. Very much so.

6 Q. And was your mother a wallflower, Sharon?

7 A. No. You know, she was very polite. Very
8 well, you know, raised. But she didn't take any
9 nonsense.

10 Q. Okay. Do you know if it was your mom's
11 negotiating abilities that led to some of the
12 Counter-offers in connection with the Purchase
13 Agreement?

14 A. Yes, they were.

15 Q. And was that because you intended or she
16 intended to complete a 1031 exchange?

17 A. Yes. None of the other partners would have
18 cared about that, including Mr. Milner. He was
19 getting up in years and he just wanted to cash
20 out.

21 Q. So there has also been some questions about
22 when the buyer became aware of your 1031 exchange.
23 Can you quickly refer to Respondent's Exhibit B and
24 C again?

25 A. Okay. Here's the B.

26 Q. And C?

27 A. Mm-hmm.

28 Q. And are both these documents dated in

1 February 2007?

2 A. They are.

3 Q. Do you believe that the buyer was aware of
4 the intent to complete a 1031 exchange at this
5 time?

6 A. Yes.

7 Q. Do you have any indication that the buyer
8 was aware before that?

9 A. I do actually. Can I put an exhibit forth?

10 No. Okay. Never mind. I'm sorry.

11 I know they were.

12 Q. Okay. How do you know?

13 A. I don't have any written correspondence
14 at all except for the letter. There was that letter
15 where they were suggesting it, and that takes way
16 back. But I know my mom had phone conversations.

17 My mom was a big telephone person. She
18 didn't type -- first of all, she never learned to
19 type. And then secondly, her arthritis was just
20 awful. My mom has never ever, ever, was never ever,
21 ever, going to type you an e-mail or type you a
22 letter, but she'll phone you.

23 Q. Okay. And also, you talked about your
24 attorney Mr. Goodman, who was your -- or your
25 mother's attorney going on to the '80s. Did he ever
26 indicate to you that timing could be an issue?

27 A. He did, but he said he'd done -- the way
28 he'd written the contract, and I can't remember

1 which contract it was, something that he did that
2 made it okay. I don't even remember what that was.
3 But I believed that what he -- how he was doing this
4 was the way that he would do something like this.

5 Q. So you trusted his expertise?

6 A. Absolutely.

7 Q. And why was that?

8 A. We had worked with him for so many years.
9 He really knew what he was doing. Not only that, he
10 was kind of famous for being a 1031 lawyer. He's
11 retired now. But prior to that, he wrote a lot of
12 articles, I think, for -- I want to use the word
13 trade journalism, but I'm not sure if that's the
14 right word for lawyer magazines. But he was truly
15 an expert.

16 MS. WEED: No further questions at this
17 time.

18 JUDGE STANLEY: Mr. Cornez.

19 RECROSS-EXAMINATION

20 BY MR. CORNEZ:

21 Q. Can you turn to Exhibit 31, please,
22 Ms. Mitchell?

23 A. Exhibit what?

24 Oh, yeah.

25 Q. And look at paragraph number one. What is
26 Exhibit 31?

27 A. This, I do remember. This is a e-mail to
28 me about the -- I guess this is exactly about the

1 exchange and how it has to be structured. I do
2 remember this is the first time I had ever heard the
3 word drop-and-swap. I thought that was a little bit
4 cheesy, but whatever.

5 And this is where he basically tells how
6 this is -- you know, how we would be doing this
7 exchange. That when we do what we're going to do,
8 we're not going to get the same amount of money as
9 the other partners. But he's warning us that we
10 could -- that, you know, whatever cash was going to
11 get disbursed afterwards, that we'd sort of be
12 forfeiting that, I think.

13 Q. In paragraph one he references an article
14 that he wrote?

15 A. Mm-hmm.

16 Q. Did you read that?

17 A. You know, I kind of didn't.

18 MR. CORNEZ: Okay. No further questions.

19 JUDGE STANLEY: Okay. Any follow-up,
20 Ms. Weed?

21 MS. WEED: No, Your Honor.

22 JUDGE STANLEY: Judge Rosas?

23 JUDGE ROSAS: Just one follow-up question
24 if I may.

25 Ms. Mitchell, you were testifying about
26 your mother's active involvement in the negotiations
27 and how she was instrumental in some of the
28 provisions in those Counter-offers that you

1 discussed earlier.

2 Do you know if -- excuse me. So that
3 Counter-offer, the final one that we have is dated
4 at the end of February 2007. Do you know if the
5 eventual sale that was consummated with the Grant
6 Deed that you signed in November 2007, if that was a
7 continuation of that transaction that your mother
8 helped negotiate, or whether that transaction fell
9 apart and there was a new deal that was struck?

10 MS. MITCHELL: No, that would have simply
11 have been one sort of step of the thing, of the same
12 kind.

13 JUDGE ROSAS: You said it was just an
14 additional step in the same transaction?

15 MS. MITCHELL: It's like just putting one
16 foot in front of the other. You know, you just plod
17 your way through the purchase of a property. And
18 that's what I would say is you do this, then you do
19 that, then you sign that, then you file that.

20 JUDGE ROSAS: So your mother's involvement,
21 which resulted in some of those provisions in those
22 Counter-offers, those stayed all the way through,
23 correct? That deal did not fall through? That was
24 consummated with the eventual Grant Deed, correct?

25 MS. MITCHELL: It was consummated, yes.

26 JUDGE ROSAS: And it was the same price in
27 that Counter-offer, 6.4, eventually that was the
28 same price throughout?

1 MS. MITCHELL: It was.

2 JUDGE ROSAS: And just, last question, in
3 regards to something that you mentioned during
4 Mrs. Weed's inquiries.

5 In Exhibit C you mentioned that -- you
6 referred to Exhibit C, which is that Counter-offer,
7 and you mentioned that that's an indication that the
8 buyers were made aware of your intent to do a -- to
9 perform a 1031 exchange.

10 Can you explain how you believe that
11 Exhibit C, which does not list you as a seller,
12 would provide the buyers with the awareness and the
13 knowledge that you, Sharon Mitchell, was going to
14 perform a 1031 exchange?

15 MS. MITCHELL: Yes. Because my mom,
16 there's no way that any of the other partners would
17 have cared about this. She was pushing for this for
18 so long and absolutely would have put herself front
19 and center in that to make sure that they came to
20 the table and agreed to it.

21 JUDGE ROSAS: Thank you, Mrs. Mitchell. I
22 have no more questions.

23 JUDGE STANLEY: Any follow-up questions,
24 Judge Geary?

25 JUDGE GEARY: No.

26 JUDGE STANLEY: Nor do I.

27 Do you have any rebuttal questions
28 following Judge Rosas' questions?

1 MS. WEED: One moment, please.
2 Just one or two quick questions.

3 FURTHER REDIRECT EXAMINATION

4 BY MS. WEED:

5 Q. Sharon, you mentioned that your mom was
6 involved in the negotiations in this transaction and
7 we have also talked about a couple of
8 Counter-offers.

9 To the best of your recollection, were
10 there ongoing negotiations after that point?

11 A. Yeah, well, there might have been, but I
12 just can't recall. I'm sorry, I can't remember.

13 MS. WEED: No further questions.

14 JUDGE STANLEY: Cross-examination?

15 MR. CORNEZ: No, thanks.

16 JUDGE STANLEY: Okay. So, Ms. Mitchell,
17 you can be excused as a witness. You're welcome to
18 stay there as the appellant.

19 Do you have any further witnesses or
20 evidence to present, Ms. Weed?

21 MS. WEED: No, Your Honor.

22 JUDGE STANLEY: Okay. I'll turn it over to
23 the Franchise Tax Board. And you haven't listed any
24 witnesses. Do you have any witnesses or evidence to
25 present?

26 MR. CORNEZ: No, we do not.

27 MR. IMMORDINO: We'll be referring to some
28 exhibits.

1 MR. CORNEZ: We have no additional
2 exhibits.

3 JUDGE STANLEY: Some of the exhibits that
4 have already been marked and summarily admitted?

5 MR. GEMMINGEN: Yes.

6 JUDGE STANLEY: The only remaining exhibit,
7 though, is Exhibit 47, and we have not admitted that
8 into evidence. Do you propose that we do admit
9 that, Ms. Weed?

10 MS. WEED: No, Your Honor.

11 JUDGE STANLEY: Okay. So that one will not
12 be admitted.

13 But I did, as a cleanup to cleanup to
14 exhibits, I didn't include the exhibit lists as
15 admitted documents. So the exhibit lists that you
16 have both provided with your binder copies will be
17 admitted into evidence as well so that we all know
18 we're referring to the same thing.

19 Now, we would like to move to closing
20 arguments. But in anticipation of that, since the
21 Franchise Tax Board in particular hasn't produced
22 any witnesses, I think that it might be helpful in
23 this situation to have the judges, if they've got
24 any issues or areas that they would like the parties
25 to address in their closing and tied to the
26 evidence, that might be helpful to both of you to be
27 able to present missing pieces that are in our
28 minds.

1 And, again, I think Judge Rosas probably
2 has a few of those. Start with you.

3 JUDGE ROSAS: Actually I'll defer to Judge
4 Geary on that.

5 JUDGE GEARY: No, not at this time.

6 JUDGE STANLEY: I can ask mine if you want
7 a minute.

8 So there are a couple of general areas that
9 I just wanted the parties to address, if you
10 wouldn't mind, when you're tying everything
11 together; that is, the proposition that the Doctrine
12 of Anticipatory Assignment of Income was raised
13 early on here, and that was in the opening
14 arguments. And I would like the parties to address
15 how there isn't any assignment of income when you
16 have a pass-through entity and you're talking about
17 the individual versus the pass-through entity.

18 And I'd like the -- it sounds like, from
19 the evidence presented, that this will be addressed
20 by both. But is there a certain holding period that
21 is backed up by any legal principle or law that says
22 that she has to hold it more than three days or more
23 than a year or any number of days or amount of time?
24 And does it matter who conducted the negotiations,
25 particularly if there was an agent working for
26 another person?

27 And my final area, I don't think it's been
28 addressed in the questions as much, but the --

1 I just lost my train of thought.

2 It'll come back to me in a second if Judge
3 Rosas wants to give any --

4 Do you have any principles or things that
5 you particularly would like them to discuss?

6 JUDGE ROSAS: Actually I do, Judge Stanley,
7 thank you.

8 And this comment's mostly directed towards
9 respondent. Respondent, in the pleadings there are
10 some indication -- indications, plural, which may
11 best be described as a contradiction, for lack of a
12 better word. On the one hand you described
13 Appellant Sharon Mitchell as not being involved with
14 the transaction as, I believe, the quote that you
15 use was "riding the coattails of the partnership."
16 But then on the other hand you talk about her
17 exercising some sort of influence or control over
18 the other partners and the partnership in terms of
19 planning and orchestrating the Assignment of Income
20 or the transfer of her tenancy-in-common interest.

21 So I'm just hoping that you can address and
22 perhaps elaborate and explain those two opposing
23 viewpoints.

24 Additionally, in regards to following up on
25 what Judge Stanley mentioned in terms of your
26 argument of the Assignment of Income, at least for
27 my benefit, it would be helpful if I could
28 understand your argument in terms of whether it is a

1 standard assignment of income argument that the
2 partnership would pay additional taxes or whether
3 you're using that argument as another way to
4 supplement your guarded, broader argument of the
5 concept of who is the true seller for tax purposes?
6 I'm trying to get a better sense from respondent in
7 terms of that argument.

8 And likewise for appellant's counsel, Ms.
9 Weed, if she can also address the issue of the
10 Assignment of Income like Judge Stanley had
11 mentioned.

12 Additionally, in regards to Caroline
13 Mitchell's role as an agent, I know that during the
14 opening statements Mr. Gemmingen mentioned a
15 partner's duty of loyalty and care to the
16 partnership. In light of the testimony that there
17 was a Durable Power of Attorney, I'm hoping that
18 respondent would address that issue and discuss the
19 possibility of whether it's possible for a partner
20 to both have that duty of loyalty and care to the
21 partnership, but also wear multiple hats, as might
22 have been the case here. Is it possible for a
23 partner to both have the best interests of the
24 partnership in mind, as well as the interests of
25 what we see before us today, a daughter slash fellow
26 partner?

27 And, Mrs. Weed, perhaps you can also
28 address that issue of agency; that would be helpful.

1 One other point would be in regards to the
2 benefits and burdens of ownership during that
3 holding period. I know that today during a
4 statement made by Mrs. Weed she mentioned
5 the liability as being one of the burdens. But if
6 both parties can elaborate on what other benefits
7 and burdens of ownership took place within this
8 short time period between the recording of the two
9 Grant Deeds.

10 And lastly, if both parties can just
11 address one of the controlling drop-and-swap cases,
12 both the Tax Court decision in *Bolker* as well as
13 the Ninth Court -- I'm sorry, the Ninth Circuit
14 Court of Appeals decision in *Bolker*, that would be
15 very helpful.

16 And in that discussion of *Bolker* it would
17 also be helpful, just as in *Bolker* they discuss
18 whether the decision in *Court Holding* was applicable
19 or *Cumberland*, and both taxing houses discussed
20 those cases, it would be very beneficial.

21 Thank you. I have nothing further.

22 JUDGE STANLEY: And the one question that I
23 had that I wanted to be addressed in closing
24 arguments that I temporarily forgot was, had the
25 partners dropped earlier and had the 17 people
26 negotiating a sale of one property, particularly on
27 the Bureau's side, would that have been considered a
28 deemed partnership anyway and disqualified it? Or

1 would that have sufficed to have satisfied what you
2 considered to be the requirements of 1031?

3 Any additional questions?

4 JUDGE GEARY: No.

5 JUDGE STANLEY: Okay. Then let's move to
6 closing arguments and ask Ms. Weed to start.

7 MS. WEED: I just wanted to clarify with
8 respect to Judge Rosas' point number two; I'm not
9 quite sure what that question was asking in terms of
10 Caroline's role as an agent, the duty of loyalty,
11 and also -- I just need some clarification on that.
12 I'm sorry.

13 JUDGE ROSAS: I'm not going to ask our
14 stenographer to repeat my question, so no worries.

15 During the opening statement, counsel for
16 respondent, Mr. Gemmingen, mentioned the duty of
17 loyalty and care that a partner has towards the
18 partnership. Then during the examination of Sharon
19 Mitchell we realized that there was a valid Durable
20 Power of Attorney.

21 So my question was in regards to whether
22 Caroline Mitchell was able to both serve the best
23 interests of the partnership on the one hand,
24 because she was on the executive board, and, also on
25 the other hand simultaneously wearing two hats, also
26 look out for her daughter's best interests because
27 she did have that Durable Power of Attorney.

28 JUDGE STANLEY: We really need to move on

1 and get to closing statements so that we can get
2 done by the end of the day here. So, you want to
3 just proceed and address the questions that were
4 asked as you can.

5 MS. WEED: Okay. I understand we want to
6 move this along. Can I have just one minute to
7 organize my notes?

8 JUDGE STANLEY: Yes.

9 MS. WEED: Okay.

10 So with respect to the issue of Assignment
11 of Income -- I mean, I guess with respect to your
12 question how a pass-through entity would assign
13 income, that was also one of my questions. I don't
14 believe that that argument makes sense in the
15 connection with a 1031 exchange because, as I've
16 stated numerous times, we're only deferring the
17 recognition of gain, not trying to avoid tax.

18 I think an assertion that this is an
19 assignment of income by the partnership wholly
20 misunderstands the purpose of 1031. There are many
21 other provisions in the Tax Code that allow for a
22 deferral of recognition of gain; for example,
23 employees and independent contractors desiring to
24 stretch out or defer their compensation to reduce
25 their tax burden may negotiate deferred compensation
26 agreements. The idea is that if a taxpayer is
27 willing to accept delayed payment of his income, he
28 will be taxed accordingly.

1 Also, with 1031 exchanges if the taxpayer
2 does not yet cash out their investment, they should
3 be taxed accordingly and be able to defer the
4 recognition of gain. Tax policy provides no warrant
5 for using the Assignment of Income Doctrine to
6 prevent tax savings through deferral.

7 Not surprisingly, courts have declined to
8 invoke the Assignment of Income Doctrine to prevent
9 deferral of income. One such case is *Keller v.*
10 *Commissioner*, that's 77 Tax Court 1014 which was
11 affirmed by the Tenth Circuit in 1983, 723 F.2d 58.

12 In this case there was a taxpayer who
13 carried out his pathology practice as an employee of
14 his wholly unprofessional service corporation. The
15 commissioner asserted -- the commissioner of
16 Internal Revenue asserted that taxpayer was taxable
17 on all earnings arising from his practice under
18 Assignment of Income Doctrine.

19 The Tax Court agreed this might be the case
20 if there was -- the total compensation he received
21 was less than what he had received absent the
22 incorporation; because at that time the amount of
23 income that could be deferred through a qualified
24 plan was much greater in the case of an employee
25 than in the case of a self-employed individual.

26 The court's refusal to apply the Assignment
27 of Income Doctrine under these circumstances
28 suggests that it did not view mere deferral of

1 income as justifying application of the Assignment
2 of Income Doctrine.

3 Likewise here, the taxpayer Sharon Mitchell
4 is simply deferring gain, not avoiding tax as the
5 FTB contends. The FTB has the burden of proof with
6 respect to evasion of tax, and the FTB has not met
7 its burden.

8 With respect to the holding period, we've
9 had testimony today from Mr. Krajewski that there is
10 no tax law or case law that he is aware of that
11 provides any specific holding period.

12 A taxpayer's intent to hold property for
13 investment must be determined at the time of the
14 exchange. I'm pulling that directly from *Bolker*.

15 In this case any period prior to the time
16 of the exchange is wholly irrelevant. To qualify
17 for nonrecognition treatment under 1031, both the
18 property transferred and the property received must
19 be held by the taxpayer, either for productive use
20 in a trade or business or for investment. And
21 that's from Treasury Regulation 1.1031(a)-1(a).

22 Here, like in the *Bolker* case, Sharon
23 Mitchell did not hold property for sale, personal
24 use, or transfer as a gift. It was held for
25 investment. She held property before the
26 transaction for investment and after. She has not
27 yet cashed in on her investment. Even prior to
28 redeeming her interest she held a partnership

1 interest for investment purposes. This
2 partnership's sole asset was 130 Tampico Way.

3 And the *Magneson* court confirmed that
4 holding an interest in a partnership can be a form
5 of an investment. *Magneson* goes on to say that the
6 central purpose of 1031, as stated by the Treasury
7 Regulation, is to provide for nonrecognition of gain
8 on a transfer of property in which the differences
9 between the property parted with and the property
10 acquired are more formal than substantial.

11 According to the Ninth Circuit in *Magneson*,
12 the case law, the regulations, and the legislative
13 history, they're all in agreement that the basic
14 reason for nonrecognition of data lock on transfers
15 is that the economic situation of the taxpayer is
16 fundamentally the same before and after the
17 transfer.

18 And there's no case law and no tax law,
19 that I'm aware of or that has been cited, that
20 indicates there's a specific holding period.
21 Section 1031 does have specific timing provisions
22 for completing the transaction. If they wanted to
23 include a specific timing provision that the
24 property needed to be held, they would have included
25 that as well.

26 To your question of does it matter who
27 conducted the negotiations, I believe that I
28 indicated in my opening statement that, you know,

1 sales transactions are negotiated on behalf of other
2 individuals or entities all the time. My partner
3 and I are currently in the process of just obtaining
4 a lease even. We're not involved in that; our
5 broker is involved in those negotiations.

6 So, I don't believe it matters that Sharon
7 Mitchell wasn't involved in every aspect. Her
8 mother definitely was. Her mother was her mentor.
9 Sharon's primary source of income is to invest in
10 properties. That's what her mother mentored her in.
11 Her mother helped negotiate them. But their
12 interests were aligned.

13 Likewise, Sharon Mitchell's interests with
14 the partnership were aligned. I don't believe that
15 if there was any indication that Sharon and her
16 mother couldn't complete a 1031 exchange without
17 their method in every other situation, that they
18 would have gone along with the partnership if their
19 interests were not aligned.

20 With respect to the question had the
21 partners dropped earlier and 17 people negotiated
22 would this be deemed a partnership anyway, my
23 understanding of a partnership is that it's two or
24 more people carrying on a business for profit. So,
25 to that extent, if there's two or more people,
26 they're carrying on this joint effort for profit, I
27 think it is arguable that there would have been a
28 partnership in any event.

1 With respect to the question whether
2 Caroline's role as an agent, if she can have -- if
3 she can serve the best interests of the partnership
4 while also serving the best interests of her
5 daughter, I think in a situation where the interests
6 of the partnership and her daughter were adverse,
7 maybe that would not be able to happen. But in this
8 case the partnership and Sharon and her mother,
9 their interests were all aligned.

10 The goal was to get this transaction
11 negotiated, to have Sharon and her mom drop out of
12 the partnership and complete the like-kind exchange.
13 That intent had been evidenced for years prior to
14 the like-kind exchange. And I think that remains
15 evident because Sharon still holds the property that
16 she ended up acquiring.

17 With respect to the benefits and burdens of
18 ownership, as I've indicated, Sharon Mitchell was
19 listed on the closing statement. If anything would
20 have gone wrong with the transaction, the buyer
21 wouldn't have just turned to Con Med; they would
22 have turned directly to Con Med, Sharon Mitchell and
23 Caroline Mitchell.

24 And I think with respect to *Bolker*, I think
25 the main point in *Bolker* is that a taxpayer's intent
26 to hold property for investment really is
27 controlling. *Bolker* is the case that talks about
28 the fact that the intent to hold property for

1 investment has to be looked at with respect to the
2 relinquished property and with respect to the
3 property that's later acquired.

4 Is there anything else that you would like
5 me to address with respect to those items?

6 JUDGE STANLEY: I think right now if you've
7 completed your statement, I'm going to let the
8 Franchise Tax Board go and we'll give you a brief
9 opportunity to make a final statement.

10 MS. WEED: Okay.

11 JUDGE STANLEY: Who's speaking on the
12 Franchise Tax Board's side?

13 MR. GEMMINGEN: Given the variety of
14 topics, we were actually going to split some of the
15 topics. And so I was wondering if it would be okay
16 for Ciro Immordino to start and then I would like to
17 also address some of your questions and then address
18 our prepared remarks.

19 JUDGE STANLEY: Let me just ask one
20 question.

21 Ms. Skidgel, if they do that, will you be
22 able to follow through to the end?

23 HEARING REPORTER: That's fine.

24 JUDGE STANLEY: Okay. Go ahead.

25 MR. IMMORDINO: Can you hear me all right?
26 How's this; is this okay?

27 HEARING REPORTER: That's fine.

28 MR. IMMORDINO: Okay. Now, beginning with

1 the discussion of the case law and the testimony of
2 Mr. Krajewski. You know, there was a discussion of
3 these cases -- *Magneson, Maloney*, the *Bolker* case --
4 and they were referring to the Ninth Circuit Court
5 of Appeals case. There was a discussion of this
6 held for investment requirement, the period of time,
7 whether taxpayer intends to liquidate their
8 investment, the continuity of investment.

9 At our first prehearing conference, you
10 know, we informed the Appellants and this Court that
11 we're not contesting "held for investment." That's
12 not an issue before you.

13 These discussions of did they intend to
14 liquidate; did they continue their investment; what
15 was their intent; those are completely irrelevant to
16 the decision that your Board has to make today.

17 Instead, place it against the Tax Court
18 case of *Bolker*. At the Tax Court case the IRS
19 argued two things: They argued held for investment,
20 and they argued what's known as the Court Holding
21 Doctrine. And the Court Holding Doctrine is also
22 the idea of who's the true seller for tax purposes,
23 despite who the civil seller is.

24 And so the Court Holding Doctrine generally
25 comes up when an entity holds property during
26 negotiations but the entity's owners are listed on
27 the sales contract. And so there's a question,
28 who's the seller for tax purposes, the entity who

1 held the property during negotiations or the
2 entity's owners who signed the sales contract?

3 And what the U.S. Supreme Court tells us in
4 *Court Holding* -- which I know has been cited, last
5 time I checked, 1,963 times -- what the U.S. Supreme
6 Court tells us is that if an entity holds and
7 negotiates the sale of property, then the U.S.
8 Supreme Court requires that the entity is the seller
9 for tax purposes.

10 And this goes to another longstanding U.S.
11 Supreme Court doctrine, which is discussed in *Mulden*
12 *Properties*, another U.S. Supreme Court case. And
13 *Mulden Properties*, the U.S. Supreme Court says, a
14 taxpayer is free to choose any entity they want and
15 they get the benefit of using that entity, but
16 they're also required to abide by the limitations.

17 And so with the partnership, the
18 partnership gets substantial flexibility and its
19 other benefits for a taxpayer, but a partnership
20 format does not allow individual partners to get
21 different tax treatment when they sell property.

22 And so why does a drop-and-swap come up?
23 Well, it comes up because you have partners in a
24 partnership; some partners want to get cash when a
25 partnership sells property, and some partners want
26 to defer gain through a like-kind exchange. This
27 treatment is not allowed if the partnership holds
28 the property.

1 As Mr. Krajewski stated, the partnership
2 can either exchange all or nothing. You can't give
3 different partners different treatment.

4 The taxpayers or the partnership took
5 advantage of the partnership structure for almost 40
6 years. At the last minute they're attempting to get
7 the benefits of having a partnership but not abide
8 by the limitations.

9 And so in this case intent is not in
10 dispute, it is not relevant. No one is arguing
11 whether or not the appellant desired to do a 1031.
12 The issue is the appellant never held the property
13 in a format which allowed her to do a 1031.

14 Throughout the time she received the
15 property in 1991 she could have distributed and held
16 it as a tenancy-in-common interest if the
17 partnership allowed. But from Mrs. Mitchell's
18 testimony, from Mr. Krajewski's testimony, and from
19 the document, it's very clear the partnership wanted
20 to maintain a partnership; it wanted to maintain the
21 benefits of having the partners being able to
22 control the transaction, as well as the other
23 flexibility, the benefits.

24 I note that, two points, especially in
25 Exhibit Number 44, the partners made it clear that
26 any partner could foul the deal by changing their
27 minds. So they didn't want to have to take
28 ownership. They wanted to have the partnership own

1 the property right through the end. In fact, in a
2 letter dated October 23, 2007, which is, I think,
3 attached to the Declaration of Mr. Milner, which
4 came in, I think, as Exhibit 45 and 46 today -- and
5 it's a letter from Goodman to Tom Milner to Caroline
6 and to Sharon.

7 And they say, they want to do a liquidation
8 and distribution concurrent with the close of
9 escrow. They want to get the benefits of a
10 partnership structure right through the time escrow
11 closes, but at the exact same time they wanted to
12 ignore the partnership as the seller and let the
13 taxpayer get the benefit of having individual
14 treatment. These are contradictory ways of owning
15 the property and they're not allowed. This goes
16 back to *Bolker*.

17 Just one more thing on intent.

18 You know, as I said, intent applies in
19 general for this "held for investment" requirement.
20 Do you intend to hold your property for investment
21 or for use in a trade or business? That's where
22 intent is relevant. Intent has no relevance to
23 who's the seller for tax purposes.

24 So, in the *Chase* case, there's no doubt
25 whatsoever the taxpayer intended to sell the
26 property individually. But the issue is that the
27 partnership held the property.

28 The same thing with *McManus versus*

1 *Commissioner*, the taxpayer asserted they were a
2 tenancy-in-common owner and they exchanged property
3 for property, but the Court held they were a
4 partnership. So you have invalid 1031 because the
5 partnership relinquished property and you received
6 property as an individual, and that's *McManus versus*
7 *Commissioner*, 583 F.2d 443.

8 In *Sandoval versus Commissioner*, 2000 case,
9 Tax Court Memo 2000-189, an individual exchanged
10 real property for other purported tenancy-in-common
11 property. The Court found that the property was
12 held by a partnership, so you have invalid 1031.

13 In all these cases they intended to get the
14 treatment of individual, but what's intended doesn't
15 matter. It's how did they hold the property? And,
16 again, in this case they held it for almost 40 years
17 as a partnership. At the very last minute they
18 wanted to ignore the partnership as the seller. And
19 that's exactly what the U.S. Supreme Court says you
20 cannot do.

21 In appeal *Court Holdings* what it comes down
22 to is the U.S. Supreme Court says:

23 "To permit the true nature of a
24 transaction to be disguised by mere
25 formalisms which exist solely to alter tax
26 liabilities would seriously impair the
27 effective administration of the tax
28 policies of Congress."

1 Say you want to have a partnership interest
2 and you want to -- your plan is always to exchange
3 out of it at the end, then you have to hold it as a
4 tenancy-in-common, not as a partnership.

5 A couple of other cases. In *Demirjian*
6 *versus Commissioner*, again, the taxpayer attempted
7 to do a like-kind exchange for property for
8 property. The Court says you're a partnership.
9 Doesn't matter what you intend to be, it's how do
10 you hold it. Okay.

11 And you have the precedential opinion the
12 *Appeal of Brookfield Manor*, which is a Board of
13 Equalization case. It has the same result. So it
14 doesn't matter if you intend to hold it a certain
15 way, it's what you actually did.

16 So going back to *Court Holding* -- or going
17 back to *Bolker*. The U.S. Supreme Court says look at
18 who negotiated the deal. And what it looks at is,
19 like I said, the rule is the entity which holds and
20 negotiates the property is the seller.

21 And so when you have a *Court Holding*
22 situation, the entity which is holding the property
23 is generally going to be the seller, unless some
24 kind of exception applies, if there's some kind of
25 fact that shows the entity holding the property
26 should not be considered the seller.

27 So, in the *Bolker* case, Mr. Bolker, as part
28 of a divorce, received real property held by the

1 corporation. And in light of the divorce, he
2 decided to have that property distributed to him.
3 He talked to his attorney, he began the distribution
4 process. He began to have that property rezoned,
5 and he was going to hold that property for a -- to
6 construct apartment buildings, which would be used
7 as personal income property.

8 So the use of the property changed. It was
9 independent of any sale. The use of the property
10 changed because Mr. Bolker wanted to hold the
11 property for his own personal investment property
12 and the distribution already put in motion.

13 So he started talking to potential lenders
14 and said I'd like to get financing for my property,
15 for me personally. All the lenders felt like maybe
16 Mr. Bolker was getting this personal loan for his
17 own personal investment property. And then he gets
18 an offer that says, "We don't want to give you a
19 loan, but we want to purchase your property."

20 So what the Bolker Tax Court case said is
21 that, here, the use of the property has changed, has
22 gone from this property held by a corporation to now
23 property held by Mr. Bolker. And so then when this
24 negotiations for a sale later happens, it was clear
25 Mr. Bolker was negotiating on behalf of him
26 personally.

27 So it's not looking at who's doing the
28 talking. It doesn't matter. If you're in a

1 partnership, you know, some partners, not all of
2 them, might be talking. If you're in a
3 tenancy-in-common -- you know, I know Mrs. Weed
4 opined that if you have multiple partners
5 negotiating when you have a TIC, and it isn't
6 considered a partnership. Well, the IRC Rev. Proc.
7 2002-22, in that, you know, it's very clear you can
8 have all the partners or all the tenancy-in-common
9 owners negotiate and not maintaining the
10 partnership, but it goes down to who's holding the
11 property. And the Court Holding Doctrine said, was
12 there a change in the use?

13 So the other case cited by Judge Rosas was
14 *Cumberland*. So in *Cumberland* you had a local
15 utility; and a foreign utility moved into the area,
16 and the local utility very quickly knew that they
17 couldn't survive. And so the local utility's
18 shareholders attempted to sell their stock in the
19 utilities to the rival utility.

20 And so the U.S. Supreme Court said here the
21 negotiations have been established between the
22 shareholders, not the utility corporation, but
23 between the shareholders and the rival utility. And
24 that's why when at some point in the process there's
25 a Counter-offer and the rival utility said, "We
26 don't want your stock, we want your assets from the
27 corporation," it was proper for the corporation to
28 distribute those assets and then to have the sale

1 take place between the two groups which had always
2 been negotiated.

3 But that's not the case here. The case
4 here is the type of case which is exactly the reason
5 why the Court Holding doctrine is around, which is
6 someone holds the property through one entity,
7 there's no change in use, there's nothing changes
8 through the entire process. It's 1991, they
9 intended to do a 1031, to sell property as if
10 they're TIC owners.

11 Nothing changed. The whole time they held
12 it as a partnership. At the very end they wanted to
13 change the ownership to do a 1031. There's no
14 business reason for doing that. It's only tax
15 deferral to get a tax benefit.

16 Now, I know Mrs. Weed spoke in detail
17 about -- and over and over about the fact that this
18 is a deferral, it's not taxable. Most taxpayers
19 would like to pay the taxes 20 years later, you
20 know. Everyone would love it. But you can only do
21 a deferral if it's statutorily allowed, and that's
22 what the issue is here. A deferral is a big tax
23 benefit; it's only allowed by statute. And if you
24 hold property of the partnership, the partnership
25 has to do your 1031.

26 And so kind of to wrap this up here, at the
27 time negotiations happened, the sale was established
28 between the partnership and the buyer. But then

1 something happened which kind of went far and
2 beyond. They signed an agreement. They signed a
3 Purchase Sale Agreement. They signed
4 Counter-offers. Every single agreement was between
5 the entity, the partnership and the buyer. At this
6 point once you have the sale agreement, now we
7 have --

8 Well, one more point. This point about
9 when the sale happens, you know, in her opening
10 statement Mrs. Weed stated that negotiations don't
11 matter. But what the U.S. Supreme Court says is
12 that negotiations are exactly what matters. The
13 deal is allocated to who the seller is at the time
14 of negotiations, who negotiates the material terms.
15 At that point the seller is locked in, for tax
16 purposes.

17 And so in this case between December and
18 February the seller was locked in, locked in as the
19 partnership. Stuff that happened within that eight
20 months, it doesn't change the *Court Holding*
21 analysis. But what did happen is they entered into
22 a Purchase Sale Agreement between the partnership
23 and the buyer. At this point -- this goes to
24 assignment of income -- the sale had ripened in the
25 name of the partnership, and that's why you have
26 assignment of income.

27 And this goes back to U.S. Supreme Court
28 case *Helvering versus Horst* where the father had a

1 coupon bond, he took the little coupon off and gave
2 it to his son. They say the right to this income
3 ripened in the name of the father. You can't then
4 assign that income, give it -- or try and transfer
5 it, whether it's a civil transfer, simply transfer
6 that coupon bond to your son. You can't change who
7 earned it.

8 At the time the Purchase Sale Agreement was
9 signed and entered into, that's what *Salvatore* tells
10 us, that now the sale has ripened to the partnership
11 and any transient -- this has gone so far beyond
12 *Court Holding*, there's an additional reason why it
13 is now -- why the gain must be allocated to the
14 partnership.

15 And then finally, I'll note at the very end
16 of the transaction here, kind of a third reason,
17 based on *Court Holding*, too, is that there's no
18 bona fide distribution. The distribution was only
19 going to happen if the sale went through. And so if
20 the sale had gone through on November 30th, then the
21 taxpayer would be a TIC owner. But what happened if
22 on November 20th something happens and the sale's
23 not going to go through? Then on November 30th, the
24 partnership would have continued to hold property.

25 So this goes back to the *Chase* case, and
26 other cases, to have a true tenancy-in-common owner,
27 you've got to do a true distribution. There's no
28 true business distribution here. And one of the

1 questions we asked the taxpayer was, where is the
2 notice to the lessees, to the tenants, that there's
3 a change in ownership? And their response was that
4 it would be a useless gesture to inform them. And
5 that's at --

6 What was that?

7 MR. GEMMINGEN: Taxpayer's protest.

8 MR. IMMORDINO: Taxpayer's protest. That
9 would be Exhibit --

10 MR. GEMMINGEN: J and K.

11 MR. IMMORDINO: So It would be a useless
12 gesture because there's no change -- no true change
13 of ownership of the property of this partnership of
14 that TIC. It was done just for the -- just for the
15 moment the sale happens they change who the owner
16 is.

17 Taxpayer talks about she's personally
18 liable. Well, where is the change in the insurance
19 documents? Did they change the insurance? Did they
20 change the bank account? Did they do a co-tenancy
21 agreement?

22 These are all things that Mr. Krajewski
23 talked about that you would do in a 1031.
24 Mr. Krajewski didn't understand the *Court Holding*
25 partnership issues. He just read the Ninth Circuit
26 court in *Bolker*. He didn't really understand the
27 environment of 1031 law. But everything he said
28 were things you have to do. Drop it down sooner to

1 show that -- change the ownership before you
2 negotiate the sale, before negotiations you drop it
3 down, you have to take it legitimate.

4 But, you know, he was talking about the
5 separate account. He talks about the Co-tenancy
6 Agreement. You know, if you own property, if you
7 distribute property from a partnership to a tenant,
8 you have a co-tenancy agreement, rules of how to --
9 how you're going to own the property together. None
10 of that happened. None of the business formalities
11 have happened. None of the legitimate transfers
12 from the partnership ownership to TIC ownership
13 happened. That's because the taxpayers only
14 intended to have this distribution to happen if the
15 sale went through.

16 And that's why that says concurrent,
17 working the distribution concurrently, concurrently
18 with the sale. Only if the sale goes through, you
19 change it. That's the third reason why there's the
20 kind of variation core point test in *Chase* where
21 substantive with their partnership.

22 That's it.

23 MR. GEMMINGEN: David Gemmingen here for
24 Franchise Tax Board. I'd like to address some of
25 the questions you posed before I get to my prepared
26 remarks.

27 And, Judge Rosas, thank you for the
28 opportunity to clarify our briefing positions. And

1 in the two statements that you addressed that you
2 thought might be opposing one another, actually
3 address two completely different situations, two
4 different transactions.

5 And so they -- do not believe they conflict
6 at all. But rather, the first one that the taxpayer
7 was not involved and, as in the words of the
8 taxpayer's own representative, the taxpayer rode the
9 coattails of the partnership -- those are from the
10 taxpayer's representative -- that concerns the
11 negotiation of the sale of the property. That's a
12 separate transaction than the later redemption by
13 the partnership with accommodating parties at the
14 end of the transaction where the partnership ensured
15 that the appellant here would be responsible for her
16 own costs that were incurred. So that's a separate
17 transaction than actually the sales transaction.

18 And as Ciro mentioned a moment ago,
19 Exhibits J and K, when asked about whether the
20 partners participated in the partnership's sale, as
21 well as whether Mitchell had done any of the
22 subsequent negotiations, the response was, in the
23 Protest Letter and Points and Authorities, Exhibit
24 K, that, "The taxpayer's an artist with no business
25 background. It is expected that the taxpayer would
26 defer to the partnership expertise."

27 At her own handwritten declaration in
28 Exhibit Q, she states -- or, excuse me, her own

1 signed declaration, I beg your pardon, she states
2 that, "I am a painter by trade and know little of
3 real estate investing. In carrying out the
4 exchange, I relied upon professionals."

5 And so those statements that she's relying
6 on others as far as the negotiation goes to the
7 question of who's the seller, the primary question
8 today before you. And with respect to accounting
9 and parties within the partnership to allow this
10 disbursement, that was done in a separate
11 transaction by a party that doesn't reflect the real
12 issue of the case, is who's the seller? That's
13 really what we need to determine.

14 And you asked about the *Bolker* tax court
15 decision. And in *Bolker* tax court decision, it
16 starts off after recitation of facts where the first
17 paragraph entitled "opinion" is, the very first
18 sentence there is, the first question you must
19 consider is, Who made the exchange? In other words,
20 Who is the seller?

21 The *Bolker* tax court went on to talk about
22 the *Hines* case, H-i-n-e-s, and stated that the
23 touchstone for determining whether the proceeds of
24 the sale to be imputed to the corporation is whether
25 the corporation actively participated in the sale.
26 That's the test. That's the active participation.
27 That's what we're looking for here today.

28 Appellant has repeatedly explained any

1 active participation in the sale of the partnership
2 here, partnership sale of the property. Accordingly,
3 she failed the test set out in Tax Court in *Bolker*,
4 as emphasized in *Hines*, as well as *Court Holding*.
5 And because of her failure to restate the sale of
6 the property and the sale was conducted under the
7 terms negotiated by the partnership, that allows the
8 tax agency here to properly impute the income to the
9 partnership.

10 And the question about whether this is a
11 pass-through entity or not, that is a very distinct
12 and a very material item that does not allow the two
13 sales to be treated the same. The question in
14 *Delwin Chase* is, Who also is the seller? It was a
15 partner. It was a general partner who withheld his
16 partnership interest. He never held himself out to
17 the third party as the seller of the property.

18 And part of the *Delwin Chase* case, it
19 affirmed that the same taxpayer that does the sale
20 has to be the same taxpayer that received the
21 replacement property. It's the same taxpayer in
22 both places of the transaction.

23 You clearly had the partnership being the
24 seller. The partnership did not receive and
25 identify any replacement property; thus, the
26 partnership did not conduct an exchange. Since the
27 taxpayer here was not the seller for tax purposes,
28 the taxpayer did not complete the first leg of the

1 exchange, and her subsequent purchase of the
2 property doesn't satisfy a 1031 because she never
3 completed the first step to begin with, she was
4 never the seller under *Delwin Chase*.

5 So the question, though, that goes onward
6 within the *Bolker* Tax Court opinion which dealt with
7 the question "who was the seller," which is not
8 addressed in the Ninth Circuit, talks about:

9 "The sine qua non imputed income rule
10 is a finding for the corporation actively
11 participated in the transaction that
12 produced the income to be imputed. Only if
13 the corporation in fact participated in the
14 sale transaction, by negotiation, or
15 participated in any other significant
16 manner, could the corporation be charged
17 with earning the income sought to be
18 taxed."

19 Since the taxpayer here has disclaimed any
20 participation in the sale, she cannot be imputed to
21 the income of the sale; rather, it's the
22 partnership's income. And being the partnership's
23 income, it is a function of -- that the *Hine's* case
24 here recognized that a corporation could still be
25 involved solely in the analysis of the *Bolker* case
26 that if you have an entity there could still be
27 imputed income, assignment of income application in
28 the facts.

1 However, in *Bolker* the taxpayer was unable
2 to establish that the corporation's negotiations
3 were old and cold. In fact, the court opinion says
4 "The prior deal was dead." And so in looking at who
5 really invested the ultimate sale negotiations for
6 the property in the *Bolker* case, the Court found
7 that the corporation was not involved. Here, it's
8 quite clear that the corporation was involved and
9 we'll get to that in a moment.

10 Now you also asked about the duty of
11 loyalty. The duty of loyalty in California
12 Corporations Code for Partners, section 16404,
13 provides that the fiduciary duties a partner owes to
14 the partnership and the other partners are a duty of
15 loyalty, the duty of care set forth in subdivisions
16 (b) and (c).

17 And a partner -- (b) goes on. A partner's
18 duty of loyalty to the partnership and the other
19 partners includes all of the following:

20 The first is, to account to the partnership
21 and hold as a trustee for it any property, profit,
22 or benefit derived by the partner in the conduct and
23 winding up with a partnership business or derived
24 from a use by a partner of partnership property.

25 The Partnership Agreement clearly sets
26 forth that this partnership will be dissolved upon
27 the sale of the property. This transaction where
28 this purported redemption occurs is all part of the

1 final sale of the property and the lining up of the
2 property.

3 The fiduciary duty of a partner in
4 16404(b)(1) are very clear that the partner has a
5 duty, a property duty, to account to the partnership
6 and hold as a trustee any property received in the
7 conduct of winding up of the partnership.

8 So while she may have a Deed for that
9 property, she still has a primary obligation as a
10 partner and a general partner in a partnership to
11 ensure that the partners' ability to sell the
12 property that it contracted for -- not "her" but
13 "it" -- takes place and is not obstructed.

14 So there's not a allowance for partners to
15 compete against the partnership because, also,
16 (b)(2) says, as far as fiduciary duties, the partner
17 has to refrain from dealing with the partnership in
18 conduct or winding up the business of the
19 partnership business.

20 And so the partner, if she were to have
21 that Deed, she could not withhold that Deed and kind
22 of renegotiate the purchase price. Rather, she has
23 the duty to honor the price that's already
24 negotiated by her partnership. And so she cannot
25 really exercise the ownership attributes of a
26 property owner because she can't withhold the
27 property; she can't renegotiate a new price; she's
28 going to be forced to sell it at a certain date;

1 this is all being done at the close of escrow. Her
2 Deed wasn't dated and wasn't even signed by the
3 partnership until November 27th. And so the
4 fiduciary duty's there to ensure that she still has
5 to act as the partner in accommodating the sale of
6 the partnership's property.

7 As to the question about *Magneson* opposing
8 counsel mentioned, *Magneson* court relied upon a
9 Corporation's Code section that has been repealed.
10 And the current and now standing Corporations Code
11 section, as referred to previously, which is 16501,
12 clearly provides that a partner does not own
13 partnership property. And so you don't look through
14 the partnership and treat the partner as owning the
15 partnership property; rather, she owns the
16 partnership interest.

17 You asked does it matter who conducted the
18 sale agreement and sale negotiations? The answer to
19 that is clearly yes. As we mentioned before in the
20 *Bolker* case, as well as in the United States Supreme
21 Court case *Court Holding*, the question is who
22 actively participated in the sale negotiations? So
23 the material facts and appellant's failure to do so
24 means that she was not the seller for tax purposes
25 and cannot claim to have engaged in a 1031.

26 As far as the distributions of 17 different
27 partners, it all depends on how that happens; what
28 are the facts during that? Did they distribute 17

1 tenant-in-common interests to the partners and now
2 they become tenant-in-common owners, they are --
3 people do own tenancy-in-common interests in
4 property. That is what a tenant-in-common interest
5 by nature is; it's a partial, fractional interest in
6 property. So clearly that can occur.

7 But they can only engage in a 1031
8 transaction if they own and operate the property,
9 either for investment or for trade or business. And
10 then if they decide to sell and do a 1031, conduct
11 their own separate negotiations for that property.

12 In this case, the taxpayer did not
13 negotiate the sale, did not own the property during
14 the time of the sale negotiations, and so that's a
15 completely different situation than we have here
16 today.

17 And you asked about the holding period.
18 While there is no definite set-out time period for a
19 holding period, a person still first has to be the
20 actual seller of the property for tax purposes in
21 order to actually have a holding period to look at.

22 In this case, since the taxpayer is not the
23 seller, you don't reach the question of a holding
24 period because she, for tax purposes, is not the
25 seller and so we never reach the question of how
26 long she held the property because the real issue
27 here is "Who's the seller?"

28 So I'd like to get back to my statement

1 here.

2 Have I addressed all your questions that
3 you had separately?

4 JUDGE STANLEY: I just think you need to do
5 the best you can at this point. And if you think
6 you've answered them all, then we can just move on.

7 MR. GEMMINGEN: So in 1991 appellant
8 inherited a 10-percent general-partner interest in
9 the partnership from her aunt.

10 I'd like to note that appellant's expert
11 stated that appellant held her interest in the
12 Tampico property for more than 16 years. Please
13 note that a general partner's interest in a
14 partnership is an intangible personal property
15 interest, which is not like-kind tangible real
16 property. Appellant actually owned an intangible
17 interest in a partnership for more than 16 years,
18 not the real property located at Tampico Way stated
19 by her -- appellant's witness.

20 If you would, if you would please turn to
21 Exhibit E of respondent's exhibits, which provides
22 appellant's aunt's will, which states, other than
23 \$3,000, that the remainder of her estate is being
24 divided to her niece, the appellant here.

25 And the second page there is the page from
26 the estate tax return from her aunt, which clearly
27 provides that there's a 10-percent
28 general-partnership interest in Con Med properties,

1 which is one of her properties which is left to
2 appellant here and has a fair market value of
3 \$41,277.

4 The 754 election, even if made in this case
5 would be limited to \$41,277. The fair market value
6 on the date of her aunt's death of that partnership
7 interest is \$41,000; that would be the price that a
8 person would pay for that interest. And that's what
9 a fair market value goes to, a person who's either
10 under compulsion to buy or sell but what someone
11 would pay for that.

12 This is what someone would have bought for
13 a 10-percent partnership interest at this time.
14 That would be the purchase price for the partnership
15 interest, and that would be the purchase price that
16 would be used for a step up in basis if one were to
17 have actually have occurred. It would be limited to
18 \$41,000, not the half a quarter million dollars now
19 proposed by appellant.

20 But, again, appellant has not satisfied the
21 burdens of substantiating that actually the
22 partnership made an election, a 754 election made by
23 the partnership, not partners, as previously
24 mentioned by the taxpayers here.

25 And so Internal Revenue Code section 1014,
26 as incorporated in California tax law, provides that
27 a beneficiary's new adjusted basis in inherited
28 assets is the fair market value of the seized

1 property at the date of death. That is, her outside
2 basis in the partnership is \$41,000 and the inside
3 basis would be adjusted to a maximum of \$41,000 if
4 that in fact occurred.

5 Also briefly return to our Exhibit A,
6 please, the Agreement of Purchase and Sale. That
7 agreement only listed the partnership of the
8 property as the seller.

9 And, at page 5, Exhibit A, at paragraph 16
10 of this Agreement of Sale there's a provision there
11 that says this is a Superseding Agreement:

12 "This agreement expresses a complete
13 agreement of the parties and supersedes all
14 prior written or oral agreements between
15 the seller and purchaser regarding the
16 purchase and sale of the property."

17 So there's a lot of illusions of the
18 taxpayer's intent to do a 1031, an intent to maybe
19 be a seller. But this provision here, which was
20 never modified by the Counter-offers and -- the
21 Counter-offers, which were ultimately signed, which
22 would be the one at C, according to the
23 partnership's letter to Con Med partners, which is
24 found at Exhibit D, dated March 2nd, 2007, where the
25 partners state:

26 "I am pleased to inform you that on
27 behalf of 'Con Med Properties'" -- in
28 quotes -- "'Partnership,' I have signed a

1 contract for the sale of the partnership's
2 property located at 130 Tampico Way."

3 And so it's very clear throughout the sale
4 negotiations that only the partnership was the
5 contemplated seller of the property, is the only
6 party ever designated as the seller. And at this
7 point in time, as of March -- February 27th, as
8 confirmed here by the March 2nd letter, that the
9 parties had discounted in any other prior
10 negotiations that these written documents represent
11 the true nature of the sale of property, which was
12 that only the partnership was selling the property.

13 Then I'll also ask you to please turn to
14 Exhibit I of respondent's, which is the Agreement of
15 Redemption of Partnership Interests. This is dated
16 November 17th, 2007. And Con Med Properties, the
17 partnership complete, 100 percent ownership of the
18 Tampico property, preceding and during the time of
19 the sales negotiations, it's confirmed in this
20 document. Because if you review at recital C,
21 provides that the partnership owns the real property
22 located at 130 Tampico Way. Appellant is not
23 mentioned here at all as far as being the owner of
24 the property.

25 Recital E goes on to state, the partnership
26 is in the contract to sell the property.

27 And recital H states, Sharon Mitchell owns
28 a 10-percent interest in the partnership.

1 The Board of Equalization's reliance on the
2 U.S. Supreme Court decision in *Commissioner versus*
3 *Lake*, noted in appeal with Cal-American, "This
4 course well-settled in anticipatory assignments of
5 income or loss cannot shift the incidence of
6 taxation."

7 The Board of Equalization went on to
8 declare, "Further, one who earns income cannot avoid
9 taxation by diverting it to another entity, and
10 anticipatory assignment of income is ineffective as
11 a means of avoiding tax liability."

12 And the deferral that the taxpayers talk
13 about, actually there is no guarantee that this tax
14 will ever be paid because at some point we're all
15 going to die. And so the point is a real estate
16 investment is deferred, deferred, deferred, and she
17 could probably do so. But the question here is, was
18 this deferral proper? Was it allowed by the code,
19 and also by the U.S. Supreme Court and *Court*
20 *Holding*?

21 The court decision in *Salvatore versus*
22 *Commissioner* is also to uphold this appeal, to
23 uphold the principle that a taxpayer cannot avoid
24 paying taxes on the sale of a property, executing a
25 Deed to another, days before the property is sold.

26 In *Salvatore*, one of the challenged Deeds
27 used to attempt to shift taxation to another was
28 only two days old, not unlike the two- and

1 three-day-old Deeds present in this appeal. The
2 fact that *Salvatore* concerned a taxpayer's attempt
3 to avoid paying a high capital gains tax on the sale
4 of her property by first executing Deeds of that
5 property to her children, the taxpayer then
6 attempted to only pay gift tax, which is
7 significantly less than the property -- than the
8 capital gains tax she would have paid if she had
9 reported the entire sale by herself.

10 Thus, tax motivations should not alter the
11 overall sales transaction, whether involving the
12 avoidance of taxation in *Salvatore* or the deferral
13 of taxation in this appeal, and that supersedes the
14 obligations to correctly attribute income to the
15 party conducting the sale.

16 The *Salvatore* court affirmed Mrs.
17 *Salvatore's* children were only conduits through
18 which to pass title, citing *Commissioner versus*
19 *Court Holding*, and Mrs. *Salvatore* alone, rather than
20 she and her children, was the seller of the gas
21 station.

22 Appellants later changed the transaction at
23 issue. The partnership's sale of the property
24 likewise did not alter its sales price of the
25 property or in any way materially affect conveyance
26 of the property through its intended buyers. And
27 appellant cannot gain a warranted tax deferral gain
28 otherwise allocated to her by virtue of the

1 partnership's sale of the property.

2 The conduit nature of appellant's actions
3 on behalf of the partnership in this appeal also
4 result from appellant's fiduciary duties as general
5 partner for fellow partners to the partnership Con
6 Med.

7 Appellant's duty to get paid prohibited
8 her from acting in a manner that interfered with the
9 partnership's sale of the property. The fiduciary
10 duties prevent appellant from attempting to obstruct
11 the sale of property, from withholding her
12 signature, she could not renegotiate a sales price,
13 withhold possession of the land from the intended
14 purchaser, all demonstrating a lack of ownership
15 criteria for tax purposes.

16 Appellant's attempts to assert a 1031
17 deferred exchange are not supported by law. They're
18 obvious and an opportunistic attempt to claim
19 unwarranted tax benefit by attempting to deflect and
20 usurp income that is properly allocated to her
21 pursuant to the partnership provisions in Internal
22 Revenue Code section 702. Quite simply, for tax
23 purposes, appellant had no real property to sell
24 and, thus, failed the fundamental first steps in
25 exchange, that is operating and selling trade or
26 business property.

27 Accordingly, there's no need for your panel
28 to even reach appellant's claimed issue of exchange

1 even at issue of arising from an independent
2 transaction occurring prior in time. The
3 partnership's sale of the property is a closed
4 transaction unrelated to the exchange of
5 appellant's -- that appellant now asserts.

6 The panel will note that in Exhibits A, B
7 and C the property's seller is consistently and only
8 designated Con Med Properties partnership. These
9 documents all demonstrate that the partnership alone
10 sold the property and the appellant's attempt to
11 recast that is unwarranted.

12 Appellant's Protest Letter, Exhibits J and
13 K, stated pertinent facts. At Exhibit J, page one,
14 respondent's exhibits, in Appellant's Protest Letter
15 Statement of Facts, appellant acknowledged that in
16 late 2006, a year before the tax year at issue, the
17 partnership entered into an agreement to sell the
18 property. This is confirmed by the Sale Agreement
19 found in Respondent's Exhibit A.

20 Contrary to appellant's current claims,
21 appellant freely admitted that at page 2 of Exhibit
22 J, her Protest Letter, and also noted in her tax
23 return's occupation line, "Appellant is an artist
24 with no business background. It is expected that
25 the taxpayer deferred to the partnership expertise
26 negotiating the sale and ride the coattails of the
27 experts." Those are the words of appellant's
28 representatives.

1 Appellant's mandatory interest in the
2 property is also acknowledged in the Protest
3 Supplement in Respondent's Exhibit K, where at line
4 6, other rental properties that appellant owned and
5 reported as rental income on her tax return Schedule
6 E, appellant failed to even list the Tampico
7 property on that schedule.

8 Appellant's representatives attempted to
9 discount appellant's failure to keep Tampico Way
10 like her other properties by claiming that no rents
11 were received during the sub period of November
12 20th, 2007 and November 30th, the closing.

13 Appellant's protest representatives failed to
14 correctly note the Deed that purportedly gave
15 appellant her ownership, claimed signed by the
16 partnership on November 27th, further shrinking
17 appellant's alleged ownership period.

18 Clearly appellant was allowed to enter
19 transactions by the partnership only at the last
20 moment, when the sale was certain to close, and only
21 before it closed.

22 The partnership's own attorney, Richard
23 Goodman, in a letter dated October 23rd, 2007 to the
24 partnership ensured that the purported distribution
25 to Appellant Sharon Mitchell would only occur
26 concurrent with the close of escrow; that's to say,
27 appellant had no true desire in separately owning
28 and operating any portion of the property, took no

1 action to do so, but only wanted to claim
2 participation with respect to the property when the
3 sale went down.

4 Appellant's own disregard for the economic
5 realities of the transaction are further
6 demonstrated with Respondent's Exhibit K, page 1,
7 when after being asked if appellant entered into a
8 separate lease with the tenant operating the
9 property, appellant's representative answered, "The
10 law does not require a taxpayer to undertake useless
11 gestures."

12 The appellant's failure to assert any
13 ownership attributes with third parties, such as the
14 property's tenants, during the trade of a purported
15 ownership otherwise required by the *Delwin Chase*
16 case previously briefed, is, as the representative
17 clearly acknowledged, predicated on the common sense
18 notion that any such activity would have been a
19 useless gesture, that the property's immediate sale
20 to new buyers was a foregone conclusion. The
21 actions of accommodating parties cannot overturn
22 applicable Supreme Court and Board of Equalization
23 precedence.

24 And as far as the items concerning the
25 appellant's statement and testimony today that she
26 received no rent, I'll ask you to look at
27 Appellant's Exhibit 30, at pages 7 and 6.

28 This is, I believe like 36 pages. So these

1 are the two First American escrow statements.

2 Page 7 of 36 of Exhibit 30, which is the
3 overall sales transaction, which is the sale price
4 for the whole property, a hundred percent of the
5 whole property, was \$6,400,000. You'll see that the
6 first line on the left, under "seller charge"
7 there's an amount of \$583. The rent for the
8 property to the tenant was, as you can see over on
9 the left column, \$17,516 per month. And that
10 divided by the 30 days of November provides a \$583
11 rental amount per day.

12 Appellant's position is that she was
13 redeemed out of the partnership on or about November
14 20th, and notwithstanding that the Deed was signed
15 later on November 27th. And given her repeated
16 testimony that she did not renegotiate the
17 property's lease, resulted the tenant was solely in
18 contract with the partnership. One has to -- the
19 documents here demonstrate that appellant still was
20 being treated as a partner by all the parties of the
21 transaction.

22 If you go to page 6, please, of Exhibit 30,
23 which is the separate segregation of the proceeds
24 related to appellant, which is the \$640,000 sale
25 amount, you'll note that she, too, has proration of
26 rent relating to the November 30th date of \$58.
27 That's one-tenth of the total proration of the rent.

28 And so if she had been truly redeemed out

1 of the partnership, she wouldn't be entitled to any
2 of the rent. She's claimed that she didn't receive
3 any rent. But why is she having to pay back a
4 prorated amount of rent into the overall pot here?
5 Because she's still being treated as a 10-percent
6 partner in the partnership. And that's why she's
7 having to repay rent here, which demonstrates that
8 she actually was allocated rent. Because you have
9 to have rent to repay -- you first have to have rent
10 allocated to you, which would have been done through
11 the partnership. And that goes all the way up
12 through the closing here of November 30th. So she's
13 only having to repay rent only on the 30th here, not
14 going back to the date of the recorded redemption.

15 So clearly she's being treated just as
16 everyone else, as a partner here, which is also
17 confirmed on her Schedule K-1 where she's still
18 listed as a 10-percent partner up on line D, as
19 provided to you earlier.

20 So the United States Supreme Court stated
21 in its *Coltec Industries* decision, a taxpayer is not
22 permitted to reap tax benefits from a transaction
23 that lacks economic reality. Real property in
24 question that's under a contract of sale would
25 insult the intended and contracted buyers regardless
26 of purported recordation of appellant's partnership
27 interests.

28 The transaction in question is a sale of

1 Con-Med's partnership's Walnut Creek property, and
2 as is stated by the United States Supreme Court in
3 *Knetsch versus U.S.*, a transaction such as
4 appellant's purported Partnership Redemption lacks
5 objective economic substance where it does not
6 appreciably affect taxpayer's beneficial interests
7 except to reduce her taxes.

8 Appellant and her fellow 10-percent
9 partners all walked away from the partnership with
10 approximately \$662,000 at the end of 2007. As shown
11 here in Schedule K-1's and Schedule D provided by
12 the appellant for this hearing, this is -- I
13 believe this is marked our Exhibit T, the group of
14 K-1's here.

15 Irwin's the first one of this group. He's
16 also a 10-percent partner in the partnership. At
17 line 10 of that first page of the K-1, over to
18 column D, it states that his total gain from the
19 property is \$611,000. And over to the second page
20 of that, at line 19 A, under column B, it states
21 that a distribution of the money is just over
22 \$662,000.

23 The next person's K-1, Teresa's, states
24 that she's a 5-percent partner. At line 10, column
25 B, she was entitled to this allocated gain in the
26 amount of \$305,550, so half the amount her
27 10-percent partner was allocated. The second page
28 of the K-1 provides that she received distribution

1 of cash of just over 331,000 or half of the
2 10-percent partners.

3 Again, this is followed by Mr. Milner's
4 K-1, which he received the same amount allocation of
5 \$305,000. And cash distributed to him as a
6 5-percent partner was also \$331,000. So if it goes
7 up to 10-percent that's \$662,000.

8 The final K-1 is Appellant Sharon
9 Mitchell's K-1. At the second page of her K-1,
10 under "distributions," she has a distribution of
11 cash just over \$22,000. When you couple this
12 \$22,000 distribution, plus the \$640,000 allocation
13 of her from the escrow, that equates to \$662,000,
14 the same amount that the other 10-percent partners
15 are getting and twice the amount of the 5-percent
16 partners. So her economic position didn't change,
17 so she comes out the same as the other partners
18 were.

19 JUDGE STANLEY: Can I just point out that
20 you guys have been closing for almost an hour? And
21 so I'd appreciate if you could make final points and
22 try to wrap this up.

23 MR. GEMMINGEN: The mere intent to
24 effectuate an exchange is not enough. For example,
25 in *Nixon versus Commissioner*, Tax Court case,
26 taxpayer informed the buyer relinquishing the
27 property that they did not want to sell the
28 relinquished property, instead desired to trade it

1 for other real estate. However, in transferring the
2 relinquished property, the taxpayers received a
3 check. The taxpayers did not deposit the check,
4 rather they endorsed the check to the seller of
5 their investment property.

6 The Tax Court determined that, despite the
7 taxpayer's original intention to exchange
8 properties, the transaction constituted a sale of
9 the relinquished property. And denying
10 nonrecognition treatment under section 1031 of the
11 code, the Court stressed use of sales proceeds to
12 pay for the replacement property did not alter the
13 fact that taxpayer used the sales proceeds
14 undistributed and not allowed by section 1031.

15 The Court opinion in *Delwin Chase*, as we
16 previously briefed, mentions that the criteria for
17 1031 must be strictly complied with. And so
18 taxpayer's intent to do something is not enough to
19 satisfy all requirements, especially the first leg
20 of it being so.

21 JUDGE STANLEY: I'll give you a little
22 context while you're thinking about how to wrap up,
23 is I wanted to assure you that we have read all the
24 briefing by both parties. We have reviewed all the
25 cases that you guys have referred us to, at least up
26 until the ones that popped up today. So if there
27 are any other final points that were not included in
28 those briefs that you can tie together --

1 MR. GEMMINGEN: I will wrap it up here.

2 JUDGE STANLEY: That would be awesome.

3 MR. GEMMINGEN: So essentially, if
4 appellant here was no more than a conduit in
5 affecting Con Med, her partnership's, sale of
6 Tampico Way property, under longstanding principles
7 in *Commissioner versus Court Holding*, shows her own
8 fiduciary duties to the partnership. This is echoed
9 by the Tax Court in *Kimbell-Diamond Milling Company*,
10 which stated, "The essential nature of the
11 transaction of the acquisition of property is to be
12 viewed as a whole, and closely related steps will
13 not be separated at the insistence of the taxpayer."

14 In conclusion, all contemporaneous evidence
15 confirms the partnership was the sole seller of the
16 property for tax purposes. The Supreme Court of the
17 United States has consistently stated that substance
18 rather than form of the transaction is controlling
19 for tax purposes.

20 Assignment of Income Doctrine is simply
21 another allocation of this concept. The Assignment
22 of Income Doctrine prohibits the splitting of income
23 among taxable parties. The Assignment of Income
24 Doctrine provides that income is ordinarily taxed to
25 the person who earns it, which in this case is the
26 partnership, and the incidence of income taxation
27 may not be shifted by anticipatory assignments.

28 Your panel is encouraged to endorse legal

1 principles raised by respondent and uphold
2 respondent's action in this appeal. Thank you.

3 JUDGE STANLEY: Okay. Does that conclude
4 your closing?

5 MR. CORNEZ: I am not saying anything.

6 JUDGE STANLEY: Thank you. I think that we
7 all get the points that you're attempting to make.

8 Let me -- and with that same context,
9 Ms. Weed, that we have read all the briefing, we
10 have read all the cases, and we don't need you to
11 reiterate any of your previous arguments. If you
12 have something to add based on what the Franchise
13 Tax Board has just mentioned in their conclusion,
14 you're welcome to do that at this time.

15 MS. WEED: Thank you.

16 Okay. So the Treasury Regulations
17 promulgated under 1031 require that a 1031 exchange
18 must be a transaction, it must be an exchange, it
19 must be an exchange of like-kind properties, and the
20 properties must transfer and receipt must be held
21 for productive use in a trade, business or
22 investment.

23 FTB has focused on the issue of who the
24 seller is, but that's not an issue. That's a fact.
25 We have a closing statement. We have deeds
26 recorded. We have the intent.

27 Respondent's counsel said they're not
28 questioning the intent. They're not questioning the

1 holding period. They're saying that's not an issue.
2 They're saying that the fact that Sharon Mitchell
3 was one of the sellers is an issue. And in fact in
4 the *Bolker* case that's not even the right question.

5 In the Tax Court case of *Bolker* it states,
6 "The first question we must consider is, 'Who made
7 the exchange?'"

8 Whether the partnership sold their interest
9 in the property or not, that's not relevant to
10 whether or not Sharon Mitchell completed a like-kind
11 exchange.

12 Con Med should not even be part of the
13 analysis. But if they are, why isn't the
14 partnership being audited? We have testimony from
15 Sharon Mitchell, we have exhibits and evidence that
16 show that the partnership did not record the full
17 amount of the sales proceeds. So why is this an
18 issue of only Sharon Mitchell?

19 Respondent's counsel has stated that most
20 taxpayers would like to be able to defer the
21 recognition of gain, but that's not the right issue
22 either. Because under 1031, which California law
23 complies with and which Congress has not made any
24 changes to as they're relevant to the case in issue,
25 Sharon Mitchell is entitled to complete a 1031
26 exchange.

27 If that is not what the State of California
28 wants to allow Sharon to do, they should change

1 that. But the FTB should not be allowed to prevent
2 her from exercising her right just because they
3 don't like the fact she exchanged this property out
4 of California. And, in fact, respondent's counsel
5 said there's no guarantee the taxpayer will ever
6 stop deferring gain. Well, I'm not aware of any
7 requirement that the taxpayer do that. I am aware
8 of 1031 and what that entitles appellant to do.

9 The *Starker* case, which is one of the
10 seminal cases in this -- with respect to this 1031
11 issue, says that 1031 is designed to avoid the
12 imposition of a tax on those who do not cash in
13 their investments in trade or business property.
14 The concern is not that a taxpayer will continue
15 their investment. The concern is that the taxpayer
16 will have the burden of paying tax on their
17 investment before they cash it out.

18 In the *Magneson* case, the *Magneson* case
19 indicates that the purpose -- I'm sorry -- the
20 crucial analysis is whether there's a continuity of
21 interest in like-kind property. As we've heard in
22 testimony, as we've seen in the exhibits, there is
23 that continuity of interest. Sharon Mitchell has
24 continued her investment.

25 To respondent's arguments regarding the
26 changes to the Corporation Code, both at the federal
27 level and California level, that issue, even though
28 the law did not change in *Magneson* at that time,

1 that issue was brought before the court by the
2 descent. And the majority in *Magneson* said that the
3 crucial question is continuity of interest and they
4 also said that in the argument the taxpayer does not
5 have full alienable rights if the partnership
6 property fails.

7 The whole premise behind a 1031 exchange is
8 that the taxpayer does not intend to alienate or
9 transfer their property. They intend to hold it for
10 investment.

11 The intent of the taxpayer controls. It's
12 important. It goes to the legislative intent. We
13 want taxpayers who invest in real property or other
14 like-kind property not to have to pay tax before
15 they cash out their investment.

16 Next, FTB has argued the step transaction
17 could apply or should apply, which is really the
18 holding in the *Court Holding* case. But even the
19 Court in *Magneson* said it's not always appropriate
20 to collapse the steps of the transaction when it's
21 not readily apparent that the transaction could have
22 been achieved directly.

23 Here, Sharon Mitchell could have exchanged
24 her partnership interest with that of another
25 partnership and there would have been further
26 analysis of what was the primary asset of the
27 partnership in order for it to be like-kind.

28 In this case the sole asset of the

1 partnership was 130 Tampico Way. Sharon could have
2 redeemed her partnership sooner. She was advised
3 not to. She was never advised that there was any
4 law that would require her to do this.

5 You know, that's not only bad tax policy to
6 apply some sort of rule that you have to drop your
7 interest out of the partnership at a certain time,
8 it's certainly not in the law. And what are
9 taxpayers supposed to do if there's no law that says
10 there's a specific time you have to hold that
11 property? There's no case law that specifically
12 says, "This is the amount of time." What are
13 taxpayers supposed to do, just guess and hope that
14 the FTB or the IRS doesn't come audit them and say,
15 "No, you're not entitled to do a 1031 exchange"?

16 With respect to the Assignment of Income
17 Doctrine, like I said, it's not applicable. We're
18 just deferring gain. And, if anything, the
19 partnership is the one who would be assigning the
20 income. They're not being audited. Sharon Mitchell
21 on her form 8824 has reported approximately
22 \$1 million in deferred gain. If anything, she is
23 putting herself out there. She is saying, "I know
24 that if I cash in on this investment, I'm going to
25 have to pay tax at that time. I am putting it on my
26 return. I'm letting everyone know that I'm
27 tax-compliant. I'm reporting it like I'm supposed
28 to. And, yes, I'm entitled to do a 1031 exchange."

1 And lastly, we would just -- I just wanted
2 to close with the fact that, you know, we do think
3 there should be a step up in basis. We don't
4 necessarily have every document from 27 years ago.
5 But all of the circumstantial evidence of the other
6 partners doing appraisals, making 754 elections, of
7 the requirement in the Second Amended Partnership
8 Agreement that an appraisal needs to be done
9 whenever there's an inherited interest points to the
10 fact that this was likely done.

11 And the FTB's duty is not to see how much
12 tax they can get out of the taxpayer, it's to see
13 what the correct amount of tax is. And Sharon
14 Mitchell is entitled to a step up in basis and she's
15 entitled to do a like-kind exchange.

16 So I would respectfully urge your Board to,
17 please, rule that this like-kind exchange did occur
18 based on the facts and that Sharon should be
19 entitled to a step up in basis.

20 Thank you.

21 JUDGE STANLEY: Thank you very much. And
22 thank you for the presentations on both sides.

23 I wanted to ask if there's any reason that
24 either party thinks that the record should not be
25 closed at this point? Ms. Weed?

26 MS. WEED: No reason it shouldn't be
27 closed.

28 JUDGE STANLEY: Franchise Tax Board?

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MR. GEMMINGEN: We agree it can be closed.
Thank you.

JUDGE STANLEY: Okay. The record in this
matter will be closed. No further documentation or
evidence will be taken under consideration. And we
will deliberate and reach a decision on this that we
hope to be mailed within a hundred days or less.

Thank you. And we're going to adjourn
today's hearing.

(Whereupon the proceedings concluded at
4:35 p.m.)

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